Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN,
JAY CLEVELAND, AND TROY KLEIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In order to find "reasonable suspicion" justifying an officer's no-knock entry into a house to serve a search warrant, must the reviewing court find the existence of at least one circumstance that, by itself and without consideration of the totality of the circumstances, is sufficient to justify the manner of entry?

2. Did the officers have a reasonable suspicion of dangerousness, futility, or destruction of evidence sufficient to justify their decision to enter the house without knocking and announcing their presence and authority?

PARTIES TO THE PROCEEDINGS

The Petitioner in this Court is the State of Montana.

The Respondents in this Court are Tanya Marie Anyan, Jay Cleveland, and Troy Klein.

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at *State v. Anyan, Cleveland, and Klein*, 104 P.3d 511 (Mont. 2004). (App. 1a-48a.)

JURISDICTION

The Montana Supreme Court opinion containing the court's judgment was filed on December 30, 2004. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

United States Constitution, Amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

These consolidated cases present important questions concerning the reasonableness, under the Fourth Amendment, of a law enforcement officer's decision to enter a house to serve a search warrant without knocking and announcing the officer's presence and authority, and the proper analysis of the particular circumstances that support the officer's decision and serve to justify the manner of entry.

Thompson Falls is a small rural community located in Sanders County near the Idaho border in western

Montana. In late May 2000 Officer Chris Nichols of the Thompson Falls Police Department began an investigation of suspected illegal drug activity occurring at a large three-level rented house on Gallatin Street in Thompson Falls. During the next two months Officer Nichols acquired sufficient evidence to establish probable cause to believe that the occupants of the Gallatin Street house were using the house to operate a clandestine methamphetamine laboratory.

In anticipation of the issuance of a search warrant, Officer Nichols contacted Sergeant Allen Bardwell of the Kalispell Police Department, who is the leader of the Kalispell SWAT team, to request assistance in serving the warrant. After meeting with Officer Nichols and learning that the house to be searched was a large structure and might be occupied by as many as fifteen individuals at the time of the search, Sergeant Bardwell determined that additional assistance would be needed, and he contacted the Flathead County Sheriff Department's SWAT team, led by Undersheriff Chuck Curry.

Officer Nichols shared all of the information developed during his investigation with Sergeant Bardwell and Undersheriff Curry. Several vehicles with Washington state license plates had been regularly observed at the Gallatin Street house, and Officer Nichols determined that one of the vehicles was registered to Troy Klein, who had been previously charged with drug offenses in Spokane County, Washington. Although Klein had identified himself as "Shawn Peterson" to local officers and others in Thompson Falls, Officer Nichols was able to identify Klein as one of several persons who were renting and occupying the house. Officer Nichols learned from Washington authorities that there were three outstanding arrest

warrants for Klein from the state of Washington, that Klein was in violation of his probation, and that Klein had previously been charged with the unlawful possession of a firearm. Officer Nichols also learned that Klein had recently purchased ammunition at a local hardware store. Officer Nichols thus believed that Klein or the other occupants of the house would be armed at the time of the search.

In addition, Officer Nichols' investigation revealed that at least six other occupants or frequent visitors at the house had criminal backgrounds involving violent offenses, including felony assault, domestic assault, intimidation with a weapon, carrying a concealed weapon, child rape, and unlawful imprisonment.

During a visit to the house Officer Nichols observed a surveillance camera monitoring the outside of the house. Nighttime patrols had established that the lights at the house were usually on all night, and Officer Nichols was concerned that the camera would permit someone inside the house to observe the approach of the police to the house and warn the occupants in advance, who could then arm themselves, barricade the doors, or destroy evidence. Sergeant Bardwell believed that the fact the occupants went to the trouble and expense of installing counter-surveillance indicated a substantial operation.

Since Officer Nichols had good reason to believe there was a methamphetamine laboratory in the house, he was concerned about the possibility of an explosion should the occupants have time to try to dismantle the lab in a hurried manner. From his training he knew that meth labs are very unstable and, if taken apart rapidly by an

untrained person, can explode and contaminate the area, posing a danger to the officers, the occupants, and others.

Officer Nichols and the two SWAT team leaders discussed the manner of executing the search warrant, including the question of whether the officers should knock and announce their presence and purpose before entering the house. Given the risks involved, it was decided that the SWAT teams should enter the house without knocking and announcing. The officers determined that it was important to get into the house as quickly as possible, before the occupants had time to react to their presence, and they planned to use sufficient manpower to take control of the situation and handle any resistance or attempts at escape.

On July 24, 2000 Officer Nichols applied for a search warrant to search the Gallatin Street house for evidence of the meth lab. The state district court (the trial court) issued the warrant, and the officers decided to execute the warrant at 4 a.m. on the following morning of July 25, 2000. That evening the house was placed under surveillance by local police officers positioned at an upstairs bedroom window in another house across the street. The officers from the other law enforcement agencies began to arrive at the Thompson Falls Police Department at about midnight for a briefing on the upcoming search. At about 2:20 a.m. one of the surveillance officers reported to Officer Nichols that Troy Klein's car had left the house about five minutes earlier and then returned to the house, and the driver had gotten out of the car and yelled at everyone to get inside the house and to turn off the lights. The surveillance officer then reported observing a lot of movement of persons in the kitchen and around the house. Officer Nichols believed that the presence of the out-of-town SWAT team officers may have been

detected and that the occupants of the house could be destroying evidence or otherwise preparing for the arrival of the officers. Officer Nichols decided to move up the time for the search as quickly as possible, and the search was conducted at about 3 a.m.

The Kalispell SWAT team entered the house at the upper level from an outside stairway, using a steel ram to break the doorjamb. The Flathead County SWAT team entered the house from the ground floor by going through an open door. As they approached the house, the Flathead County officers encountered another surveillance camera mounted on a tripod near the carport and the entry door. The officers did not knock and announce their presence before entering the house to execute the warrant. The six occupants of the house, including Troy Klein, Jay Cleveland, and Tanya Anyan (the defendants), were arrested, the meth lab was located, and a quantity of methamphetamine was seized.

In separate proceedings before the Twentieth Judicial District Court, Sanders County, Montana, the three defendants were charged with conspiracy to manufacture dangerous drugs, criminal production or manufacture of dangerous drugs, criminal possession of dangerous drugs, and possession of dangerous drugs with intent to sell. The defendants filed motions to suppress the dangerous drug evidence, based upon the officers' failure to knock and announce their presence prior to entering the house to serve the search warrant. Attached to the motions to suppress were affidavits by Sergeant Bardwell and Undersheriff Curry. The Sanders County Attorney filed briefs in opposition to the suppression motions, attaching additional affidavits by Officer Nichols and Sergeant Bardwell. (App. 55a-61a.) The trial court denied the motions without

an evidentiary hearing, adopting the authority and rationale of the State's responses.

The defendants entered into plea agreements with the State, reserving their right to appeal from the adverse rulings on their suppression motions. On appeal the defendants argued that they were entitled to an evidentiary hearing to determine the facts pertaining to the officers' no-knock entry. The Montana Supreme Court agreed, dismissed the appeals without prejudice, and remanded the cases to the trial court for an evidentiary hearing on the motions to suppress and the entry of findings of fact and conclusions of law.

The three cases were consolidated, and the trial court conducted an evidentiary hearing on June 10, 2002. The trial court received testimony from Sergeant Bardwell, Undersheriff Curry, and Shawna Reinschmidt, the surveillance officer who reported the activities at the house just before the search. The trial court also received the deposition testimony of Officer Nichols, who was unable to attend the evidentiary hearing.

From the testimony, exhibits, and court file the trial court found that at the time of the execution of the search warrant Officer Nichols knew, or had information leading him to reasonably believe, the existence of certain facts and circumstances that justified the no-knock entry, such as the presence of surveillance cameras, the presence of firearms in the house, the potential for violence during execution of the warrant, the large size of the house and large number of occupants, the presence of a fugitive felon, and the presence of a volatile and hazardous methamphetamine lab. (App. 49a-51a.)

Since all of the parties cited and relied upon *Richards v. Wisconsin*, 520 U.S. 385 (1997), in support of or opposition to the suppression motions, the trial court applied the standard announced in *Richards* for justification, consistent with the Fourth Amendment, of a no-knock entry to serve a search warrant. To justify such an entry under the *Richards* standard, the police must have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." 520 U.S. at 394. The trial court noted that the facts known or reasonably believed by the officers must be considered in their totality, not individually, when determining whether or not it was reasonable for the officers not to knock and announce. (App. 53a.)

Based on the totality of the circumstances confronting the officers, the trial court found that it was reasonable for the officers to believe that knocking and announcing would be dangerous to the officers or futile to the occupants of the house, and that the effective investigation of the crime would be inhibited by the possible destruction of evidence. The trial court again denied the motions to suppress. (App. 54a.)

On appeal a closely divided Montana Supreme Court reversed the trial court's ruling. Applying the *Richards* test to the situation confronting the officers, the court concluded that the officers' no-knock entry to serve the search warrant violated the defendants' federal and state constitutional rights to be free from unreasonable searches and seizures. (App. 30a.)

The Montana Supreme Court reviewed each of the exigencies asserted by the State as justification for the no-knock entry, finding no circumstance sufficient by itself to justify dispensing with the Fourth Amendment's knock-and-announce requirement. Addressing the safety concerns first, the court cited *United States v. Becker*, 23 F.3d 1537 (9th Cir. 1994), and concluded that evidence that firearms are within the residence to be searched or that a particular defendant is armed is not by itself sufficient to create an exigency. The court disregarded Officer Nichols' evidence of the occupants' criminal backgrounds involving violent offenses, asserting erroneously that Officer Nichols did not discover the criminal records until after the search.[1] The court observed that the officers had not seen any weapons at the house and did not know that the occupants were prone to violence or had ever made threats against law enforcement officers. (App. 21a-24a.)

The court also dismissed the officers' concerns about the inherent dangers in methamphetamine labs, noting that the officers had not evacuated the neighborhood at

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[1] The evidence before the trial court established that Officer Nichols investigated the criminal backgrounds of the individuals he was able to identify as occupants or frequent visitors of the Gallatin Street house before he applied for the search warrant. Several months after the search, in response to the defendants' suppression motions, Officer Nichols prepared an affidavit that summarized the information pertinent to the no-knock entry that he had acquired during his pre-search investigation, including the criminal histories of the occupants. (App. 55a-58a.) The affidavit was submitted with the State's responses to the suppression motions. Officer Nichols testified in his deposition that he acquired the information in the affidavit, which he confirmed as true, prior to the application for the search warrant. (Nichols Depo. at 31, 65-66.) The state appellate court's erroneous assertion to the contrary was apparently based on an assertion in the defendants' reply brief on appeal.

the time of the search, that the surveillance officer's observations of the activities at the house just before the search were also consistent with the occupants retiring for the night, and that the officers did not detect any sounds of suspicious activity within the house as they approached it to serve the warrant. (App. 24a-25a.)

Concerning the futility exception, the Montana Supreme Court discounted the presence of the surveillance cameras, concluding that the officers did not have any information about the cameras' capabilities at night, that the officers were not concerned about the cameras since they planned to be inside the house in a matter of seconds, and that the surveillance equipment did not constitute an exigent circumstance. (App. 25a-28a.)

The state appellate court also concluded that the possibility of the destruction of evidence did not create an exigent circumstance justifying the no-knock entry. Since the officers were searching for a meth lab rather than a small amount of drugs, the court determined that evidence of the lab was less likely to be destroyed during the period between a knock/announcement and the subsequent entry. (App. 28a.)

Responding to the dissenting justices' concern that the majority had taken the "totality" out of the "totality of the circumstances" analysis, the court stated that each circumstance must be considered on its own strength in order to examine the totality of the circumstances. The court cited *People v. Condon*, 592 N.E.2d 951 (Ill. 1992), *cert. denied*, 507 U.S. 948 (1993) for the proposition that the circumstances of a case should not be viewed synergistically and that the sheer volume of circumstances, not one of which standing alone would create an exigency,

may not amount to exigent circumstances without something more. Adopting the reasoning in *Condon*, the court concluded that each potential exigent circumstance must be considered separately rather than collectively. Citing its own decision in *State v. Giant*, 37 P.3d 49 (Mont. 2001), the court summarized its analytical approach by stating simply that zero plus zero can never equal one. (App. 32a-33a.)

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Montana Supreme Court's "zero plus zero" analytical approach to the determination of the Fourth Amendment's "reasonable suspicion" requirement is inconsistent with this Court's decisions that embrace a "totality of the circumstances" analysis as appropriate for the assessment of the reasonableness of police conduct during the execution of a search warrant. The result of the Montana Supreme Court's erroneous interpretation and application of the Fourth Amendment's reasonableness standard is a significantly increased burden upon the State to justify an officer's decision to make a no-knock entry. This Court should grant certiorari review, reverse the judgment of the Montana Supreme Court, and remand the cases for further proceedings not inconsistent with the totality analysis required by the Fourth Amendment.

I. THE MONTANA SUPREME COURT'S REJECTION OF A "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS IN THE DETERMINATION OF "REASONABLE SUSPICION" JUSTIFYING A NO-KNOCK ENTRY CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING THE APPROPRIATE INQUIRY UNDER THE FOURTH AMENDMENT.

In its assessment of the reasonableness of police conduct under the Fourth Amendment, this Court has consistently examined the totality of the circumstances confronting the officers at the time of the challenged conduct, eschewing bright-line rules and judicially created categories in favor of an analytical approach that requires the reviewing court to consider "the whole picture" with all its fact-specific details. *See, e.g., United States v. Sokolow*, 490 U.S. 1, 7 (1989), *citing Illinois v. Gates*, 462 U.S. 213, 232 (1983); *United States v. Cortez*, 449 U.S. 411, 417 (1981). The Montana Supreme Court's rejection of the "totality of the circumstances" analysis is in conflict not only with this Court's general Fourth Amendment approach to the reasonableness inquiry but also with the totality analysis specifically utilized by this Court in its previous no-knock cases.

In *Richards v. Wisconsin*, *supra*, this Court reaffirmed its earlier holding, in *Wilson v. Arkansas*, 514 U.S. 927 (1995), that the Fourth Amendment's prohibition of "unreasonable" searches incorporates the common-law requirement that police officers entering a dwelling to serve a search warrant must knock on the door and announce their identity and purpose before attempting forcible entry. The Court recognized in *Wilson*, however, that the rule of announcement cannot be rigidly applied

without considering countervailing law enforcement interests. The Court left to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. 514 U.S. at 936.

The Court in *Richards* concluded that the Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug cases or any other category of criminal activity. The reviewing court must determine in each case whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement. As noted above, to justify a no-knock entry under the *Richards* test, the police "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." 520 U.S. at 394.

As the Court observed in *Richards*, the "reasonable suspicion" standard, as opposed to a "probable cause" requirement, strikes the appropriate balance between legitimate law enforcement concerns arising from the execution of search warrants and individual privacy interests affected by no-knock entries. The Court stated that the showing of a "reasonable suspicion" is not high, but police should be required to make it whenever the reasonableness of a no-knock entry is challenged. *Id.*

The two supporting cases cited by the Court – *Maryland v. Buie*, 494 U.S. 325 (1990) and *Terry v. Ohio*, 392 U.S. 1 (1968) – confirm that the test for "reasonable suspicion" under *Richards* requires the reviewing court to

consider the particular circumstances confronting the officers in their totality, not in isolation from each other. Applied to the no-knock issue, reasonable suspicion must be based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers' belief in the dangerousness, futility, or risk to the investigation that could result from knocking and announcing. *Buie*, *supra* at 332, *citing Michigan v. Long*, 463 U.S. 1032 (1983), and *Terry v. Ohio*, *supra*.

In *United States v. Banks*, 540 U.S. 31, 35-36 (2003), this Court reaffirmed the necessity of examining the totality of the circumstances to determine the reasonableness of the manner in which a warrant is executed. The Court observed that it has treated reasonableness "as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case." *Id.* Since the Fourth Amendment says nothing specific about the formalities in serving a search warrant, the Court has fleshed out the notion of reasonable execution on a case-by-case basis, avoiding categories and protocols that give short shrift to details that may turn out to be important in other cases. *Id.*

In *Banks* the Court emphasized the importance of the totality analysis and disapproved the approach taken by the Ninth Circuit Court of Appeals to create a set of subrules, with enhanced evidentiary requirements for certain kinds of exigency, for determining the reasonableness of an officer's entry to execute a search warrant. *See also United States v. Ramirez*, 523 U.S. 65 (1998). Noting that the same concern arose in *United States v. Arvizu*, 534 U.S. 266 (2002), the Court stated that the Ninth Circuit's

"overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes." *Banks*, 540 U.S. at 42.

Similar concerns arise from the Montana Supreme Court's analysis here. The state court's "divide and conquer" analysis eliminates the effect of each particular circumstance by reviewing it in isolation, finding it insufficient by itself to constitute an exigency, and disregarding its cumulative impact on the determination of "reasonable suspicion." By assigning each such circumstance a weight of zero, the state court concludes that the State may never justify a no-knock entry without establishing at least one factor that, standing by itself, provides complete justification. The state court's analysis would, in effect, create new but extremely limited variations of the categorical "blanket exception" disapproved by the Court in *Richards*.

The totality analysis is an essential component of this Court's Fourth Amendment jurisprudence. By substituting a categorical "all or nothing" approach for this Court's flexible standard of determining reasonableness by examination of the totality of the circumstances, the Montana Supreme Court's analytical approach to the issue is in significant conflict with *Banks*, *Arvizu*, and the long line of this Court's prior decisions concerning the reasonableness inquiry. The Court should grant the petition to resolve this conflict.

II. IN REVERSING THE TRIAL COURT'S DETERMINATION OF "REASONABLE SUSPICION," THE MONTANA SUPREME COURT MISAPPLIED *RICHARDS V. WISCONSIN.*

Apart from its express rejection of the totality analysis adopted by this Court for questions arising from the Fourth Amendment's reasonableness requirement, the Montana Supreme Court misapplied *Richards* to the particular circumstances evident in this case. The effect of the state court's misapplication is to elevate the showing for "reasonable suspicion" to a level of judicial scrutiny and factual certainty approximating or exceeding that required for "probable cause." This Court should grant certiorari review to clarify the appropriate level of judicial scrutiny reflecting the proper balance, under the Fourth Amendment, between the privacy interests affected by an unannounced entry and law enforcement's interests in reducing the risks inherent in the execution of a search warrant.

While the police are required, under *Richards*, to make the showing of "reasonable suspicion" whenever the propriety of a no-knock entry is challenged, the requisite showing is "not high." 520 U.S. at 394-95. To satisfy the showing under *Richards* and the "reasonable suspicion" cases to which it refers, the State must simply establish that the officers had objective, specific, and articulable data or information from which an experienced officer may make certain inferences that give rise to a reasonable suspicion of danger, futility, or destruction of evidence. The level of proof is substantially less than that required to establish probable cause for the issuance of a search or arrest warrant.

For example, in this case Klein's purchase of ammunition is an objective, specific fact from which an experienced officer may properly infer that Klein or an associate has a weapon that could be used against the officer during the execution of the search warrant. Similarly, the presence of a surveillance camera is an objective, specific fact from which an experienced officer may make the inference that the approaches to the house are being monitored and the drug operation is substantial. The criminal records of the occupants at the Thompson Falls house are objective information from which an experienced officer could reasonably infer an increased risk of violent resistance to the search.

Instead of focusing on the information that the officers did possess and the inferences that may be reasonably made from that information, the Montana Supreme Court's decision shifts the focus of its inquiry to the information that the officers did not have. The state court gives apparent dispositive weight to its observations that, for instance, none of the officers could testify to having seen weapons at the house, that there was no evidence the suspects had previously threatened law enforcement officers, that the officers had no information that the surveillance cameras were operational in the dark, and that the officers did not hear any sounds of the destruction of evidence as they approached the house to serve the search warrant.

Dissenting from the denial of certiorari in *Illinois v. Condon*, 507 U.S. 948 (1993), Justice White, joined by the Chief Justice, noted the conflict among lower courts concerning the factual showings necessary to demonstrate exigent circumstances justifying an unannounced entry. This Court's subsequent decisions in *Wilson*, *Richards*,

Ramirez, and *Banks* have settled some of the questions, particularly with respect to the futility exigency at issue in *Richards*. The Montana Supreme Court's decision presents the Court with an opportunity to clarify the level of judicial scrutiny and the extent of the factual showing required under the *Richards* standard. This Court should grant the writ to provide law enforcement officers, prosecutors, and the lower courts with additional guidance in this matter of significant importance.

III. THE MONTANA SUPREME COURT'S REFERENCES TO THE MONTANA CONSTITUTION DO NOT PRECLUDE THE EXERCISE OF THIS COURT'S JURISDICTION TO REVIEW THE DECISION.

In its decision the Montana Supreme Court cites both federal and state constitutional law, raising the question of whether its judgment rests on an adequate and independent state ground. Reviewing the decision in light of *Michigan v. Long*, 463 U.S. 1032 (1983), this Court should find nothing in the state court's opinion to preclude the exercise of this Court's jurisdiction to consider the Fourth Amendment issues in this case.

The Montana Supreme Court's decision makes two references to the Montana Constitution. Initially, the court notes that the issue concerning the no-knock entry was one of first impression in Montana, and that the court would look to the relevant federal law and the law from other states to decide the issue. The court then states that it would also look "to the greater protections afforded to Montanans in search and seizure matters under article II, sections 10 and 11 of the Montana Constitution." The court

cites, without discussion, several of its previous decisions involving search and seizure issues resolved on state constitutional grounds. (App. 9a.)

The court then proceeds to analyze the issue exclusively under Fourth Amendment law, particularly *Richards v. Wisconsin*, *supra*. (App. 9a-28a.) In its conclusion, the court makes the observation that under the Fourth Amendment and the federal authority cited in its discussion, the knock and announce rule applies in Montana. The court then states that even if it were not for that authority, Sections 10 and 11 of Article II in the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution. Applying these authorities, the court concludes that the forced entry into the defendants' house was unreasonable under the Fourth Amendment and the Montana Constitution's privacy (Section 10) and search and seizure (Section 11) provisions. (App. 29a-30a.)

This Court presumes the existence of a federal question, subject to this Court's exercise of jurisdiction, in cases where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, *supra*, 463 U.S. at 1040-41. The Montana Supreme Court's decision here is factually indistinguishable from *Long* with respect to the existence of jurisdiction. Here, as in *Long*, the state court indicated that its holding was supported by both the federal and the analogous state constitutional provisions. However, the Montana Supreme Court's legal analysis, like that of the Michigan Supreme Court in *Long*, relied exclusively on

federal precedent, with a few scattered citations to decisions from other states.

Despite the assertion that Michigan courts have provided greater protection from searches and seizures under the state constitution than is afforded under the Fourth Amendment, this Court in *Long* found no barrier to the exercise of its jurisdiction in light of the state court's reliance on its understanding of federal law; similarly, the Montana Supreme Court's references to the Montana Constitution "in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law." *Long*, *supra*, 463 U.S. at 1044. *See also Ohio v. Robinette*, 519 U.S. 33, 37 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 942 (1996).

Since it is not clear from the Montana Supreme Court's opinion itself that the state court relied on an adequate and independent state ground, this Court has jurisdiction to review the opinion. The opinion does not set forth a plain statement asserting any such independent ground, and it fairly appears that the court rested its decision primarily on federal law. *Long*, *supra*, 463 U.S. at 1042. The state court's conclusory references to the Montana Constitution's "greater protections" do not preclude this Court's jurisdiction to review the federal question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 2005

APPENDIX A

No. 02-639

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2004 MT 395

STATE OF MONTANA,

Plaintiff and Respondent,

v.

TANYA MARIE ANYAN,
JAY CLEVELAND, AND
TROY KLEIN,

Defendants and Appellants. (Filed Dec. 30, 2004)

APPEAL FROM: District Court of the Twentieth Judicial District, In and for the County of Sanders, Cause No. DC 00-44, 48, and 50 The Honorable C.B. McNeil, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Kristina Guest, Appellate Defender Office, Helena, Montana (attorney for Klein); John O. Putikka, Attorney at Law, Thompson Falls, Montana (attorney for Anyan); Carolyn S. Gill, Attorney at Law, Plains, Montana (Attorney for Cleveland).

For Respondent:

Honorable Mike McGrath, Montana Attorney General, John Paulson, Assistant Attorney General, Helena, Montana; Robert Zimmerman, Sanders County Attorney, Thompson Falls, Montana.

Argued: September 11, 2003
Submitted: September 25, 2003
Decided: December 30, 2004

Filed:

/s/ Ed Smith
Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1 Appellants Tanya Marie Anyan, Jay Cleveland, and Troy Klein were each convicted of drug-related felonies in the District Court for the Twentieth Judicial District, Sanders County, after pleading guilty to the charges pursuant to a plea agreement. We reverse and remand for further proceedings consistent with this Opinion.

¶2 We address the following issue on appeal: Whether law enforcement officers' no-knock entry into Appellants' house to execute a search warrant violated Appellants' constitutional rights to privacy and to be free from unreasonable searches and seizures.

Factual and Procedural Background

¶3 In late May 2000, Officer Christopher Nichols of the Thompson Falls Police Department was assigned to

investigate suspected illegal drug activity occurring at a rented house in Thompson Falls. During the course of the investigation, Officer Nichols determined that the occupants of the house were involved in operating a clandestine methamphetamine lab. Hence, on July 11, 2000, Officer Nichols requested the assistance of Sergeant Allen Bardwell, an officer with the Kalispell Police Department and team leader of the Kalispell SWAT team, in serving a search warrant. After meeting with Officer Nichols and learning that the house to be searched was a large structure consisting of three levels with numerous rooms and that it might be occupied by as many as fifteen individuals, Sergeant Bardwell contacted the Flathead County Sheriff Department's SWAT team for assistance. The commander of the Flathead County SWAT team, Undersheriff Chuck Curry, agreed to assist in the service of the warrant.

¶4 On July 24, 2000, Officer Nichols obtained a warrant to search the residence. In his application for the search warrant, Officer Nichols related that "out of the ordinary traffic" was seen coming and going from the residence and that a great number of the vehicles were from Washington state. Officer Nichols also stated that he checked the license plates on three of the vehicles that he had seen at the residence. One of them was registered to Klein. Officer Nichols then checked with Spokane County and discovered that Klein had been charged in the past with committing drug offenses. According to Officer Nichols, Klein also had three active felony warrants.

¶5 Officer Nichols also related in his search warrant application that several other individuals that had been seen near the residence had been charged with drug offenses. In addition, one of the vehicles seen at the

residence was registered to an individual who had felony convictions for burglary and child rape. Officer Nichols also related that during his investigation, he discovered that there was a surveillance camera located in the second story east window of the residence and that it appeared to be pointed at the driveway.

¶6 Officer Nichols had discovered during the course of his investigation that an individual matching Klein's description had purchased ammunition from a local hardware store. While he did not include this information in the application for the search warrant, Officer Nichols did share this information with Sergeant Bardwell and Undersheriff Curry. However, the two-and-a-half month investigation, which included surveillance of the home, had yielded no observation or reports of weapons sighted in the home or in the possession of any of the individuals in the home. Officer Nichols also discovered that Klein had a warrant for his arrest in connection with a nonviolent felony parole violation.

¶7 On the night of July 25, 2000, the two SWAT teams, totaling fifteen men, and officers from several other law enforcement agencies converged on Thompson Falls at approximately 1:45 a.m. Officer Nichols, Sergeant Bardwell, and Undersheriff Curry discussed the manner of executing the search warrant, including the question of whether the officers should knock and announce their presence and purpose before entering the house. They decided that the SWAT teams should enter the house at 4:00 a.m. without knocking and announcing.

¶8 On the morning of the raid, while the SWAT teams and other officers convened at the Thompson Falls Police Department for briefing, Officer Nichols ordered two

officers to conduct surveillance on the residence from an upstairs bedroom of the house across the street. Officer Shawna Reinschmidt was watching the activities in the front of the house at 2:20 a.m. when a car, which had left the house about five minutes earlier, returned, and the male driver got out of the car and yelled at everyone to get inside and turn off the lights. Officer Reinschmidt reported her observations to the SWAT team assembled at the police department. Fearing that their presence may have been detected, the officers decided not to wait until 4:00 a.m. to execute the warrant. Officer Reinschmidt continued to observe the house and although she saw some movement in the kitchen, she later testified that her observations were entirely consistent with the occupants preparing to retire for the night.

¶9 Law enforcement officers executed their no-knock raid at 3:00 a.m. As the officers approached the house they observed that it was quiet and most of the lights were off. None of the officers detected any activity or heard anything consistent with attempts to escape or resist arrest. There was no indication that any of the occupants had detected the officers' presence or anticipated the raid. There was also no indication that the house had been barricaded or booby trapped.

¶10 The officers approached the home from the west and the north, outside of the range of the surveillance camera located on the east side of the house. The Kalispell SWAT team was assigned to enter the house at the upper level from an outside stairway and the Flathead County SWAT team was assigned to enter the house from the ground floor. At least six officers from the Kalispell SWAT team entered the top floor by using a steel ram to break the doorjamb. They confronted four of the occupants of the

house who were in various stages of sleep and preparation for sleep. Another seven or eight officers from the Flathead County SWAT team entered the house through the downstairs kitchen door confronting the two occupants residing in that portion of the house. Another five to ten officers surrounded the house. The officers did not knock and announce their presence prior to entering the house.

¶11 The six occupants of the house were all arrested, removed from the house, decontaminated and given clean jail clothing. Officers from the Criminal Investigation Division of the Montana Department of Justice then entered the house to collect evidence, disassemble the meth lab and decontaminate the area.

¶12 Appellants were each charged in separate proceedings with conspiracy to manufacture dangerous drugs; criminal production or manufacture of dangerous drugs; criminal possession of dangerous drugs; and possession of dangerous drugs with intent to sell. Appellants each filed motions to suppress the evidence seized during the search of the residence, based in part on the officers' failure to knock and announce their presence prior to entering the house to execute the search warrant. The District Court denied the motions without an evidentiary hearing.

¶13 Cleveland and Anyan entered into plea agreements with the State, reserving the right to appeal from the District Court's adverse rulings on their motions to suppress. Cleveland pled guilty to criminal possession of dangerous drugs and was sentenced to a term of five years in Montana State Prison (MSP), with two years suspended. Anyan pled guilty to conspiracy to manufacture dangerous drugs and criminal possession of dangerous drugs. The District Court deferred imposition of Anyan's

sentence for concurrent terms of five years and placed her on probation subject to certain conditions, including payment of $9,000 in restitution for her share of the damages caused to the rented house by the chemicals from the methamphetamine lab. Cleveland and Anyan appealed the District Court's failure to hold an evidentiary hearing in connection with their motions to suppress and to enter Findings of Fact and Conclusions of Law as required by § 46-13-104(3), MCA. On June 5, 2001, this Court consolidated the two appeals.

¶14 Klein entered into a plea agreement on June 19, 2001, wherein he reserved the right to appeal from the District Court's ruling on his motion to suppress. Klein pled guilty to criminal production or manufacture of dangerous drugs and possession of dangerous drugs with intent to sell. The District Court sentenced Klein to a term of ten years in MSP for the charge of criminal production or manufacture of dangerous drugs and a concurrent term of twenty years, with ten years suspended for the charge of possession with intent to sell. Klein filed a notice of appeal on August 13, 2001.

¶15 On February 7, 2002, this Court issued an Order in the consolidated appeals of Anyan and Cleveland, dismissing the appeals without prejudice and remanding the cases to the District Court for an evidentiary hearing on the motions to suppress and the entry of Findings of Fact and Conclusions of Law. Klein's appeal was also dismissed without prejudice pursuant to a stipulation, and remanded to the District Court. Thereafter, Klein's case was consolidated with Anyan's and Cleveland's cases for purposes of the evidentiary hearing regarding the suppression motions.

¶16 On June 10, 2002, the District Court conducted the evidentiary hearing ordered by this Court. At the hearing, the court received testimony from Sergeant Bardwell, Undersheriff Curry, and Officer Reinschmidt. In addition, the District Court received the deposition testimony of Officer Nichols, who was unable to attend the evidentiary hearing because of his deployment with the National Guard.

¶17 The District Court issued its Findings of Fact, Conclusions of Law and Order denying Appellants' motions to suppress on July 31, 2002. In its order, the District Court determined that it was reasonable for law enforcement officers to believe that knocking and announcing their presence would be either dangerous, futile, or that it would inhibit the effective investigation of the crime by allowing the destruction of evidence. Hence, the District Court concluded that the no-knock entry was justified in this case and the court again denied Appellants' motions to suppress. Appellants filed a consolidated notice of appeal on August 8, 2002.

Standard of Review

¶18 We review a district court's denial of a motion to suppress to determine whether the district court's findings of fact are clearly erroneous and whether those findings were correctly applied as a matter of law. *State v. Olson,* 2003 MT 61, ¶ 11, 314 Mont. 402, ¶ 11, 66 P.3d 297, ¶ 11 (citing *State v. Dawson,* 1999 MT 171, ¶ 13, 295 Mont. 212, ¶ 13, 983 P.2d 916, ¶ 13). Further, the Ninth Circuit Court of Appeals has specifically held that the issue of whether exigent circumstances exist in the execution of a search warrant should be reviewed *de novo. United States v.*

Furrow (9th Cir. 2000), 229 F.3d 805, 811, *overruled on other grounds by United States v. Johnson* (9th Cir. 2001), 256 F.3d 895.

Discussion

¶19 *Whether law enforcement officers' no-knock entry into Appellants' house to execute a search warrant violated Appellants' constitutional rights to privacy and to be free from unreasonable searches and seizures.*

¶20 This is an issue of first impression in Montana. Montana has no statutory provisions or case law addressing the knock and announce rule. Consequently, we look to the relevant federal law and the laws of our sister states to decide this issue. We also look to the greater protections afforded to Montanans in search and seizure matters under Article II, Sections 10 and 11 of the Montana Constitution. *See State v. Bullock* (1995), 272 Mont. 361, 383-84, 901 P.2d 61, 75; *State v. Siegal* (1997), 281 Mont. 250, 262-63, 934 P.2d 176, 183, *overruled in part and on other grounds by State v. Kuneff,* 1998 MT 287, 291 Mont. 474, 970 P.2d 556; *State v. Elison,* 2000 MT 288, ¶¶ 46-47, 302 Mont. 228, ¶¶ 46-47, 14 P.3d 456, ¶¶ 46-47.

¶21 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The knock and announce rule recognizes the powerful protections afforded by the Fourth Amendment to the sanctity of the home.

> Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved. The sanctity of a person's home, perhaps our last real retreat in

> this technological age, lies at the very core of the rights which animate the amendment. Therefore, we have been adamant in our demand that absent exigent circumstances a warrant will be required before a person's home is invaded by the authorities.

United States v. Becker (9th Cir. 1994), 23 F.3d 1537, 1539-40 (internal citations omitted). The knock and announce rule is intended to strike the proper balance between individual rights and the police power of the state. *People v. Condon* (Ill. 1992), 592 N.E.2d 951, 957, *cert. denied,* 507 U.S. 948, 113 S.Ct. 1359, 122 L.Ed.2d 738 (1993).

¶22 Underlying the knock and announce rule are concerns for the protection of privacy, reduction in the potential for violence, and the prevention of the destruction of property of private citizens. *State v. Bamber* (Fla. 1994), 630 So.2d 1048, 1052 (citing 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment,* § 4.8(a) (2d ed. 1987) (hereinafter *LaFave*)). "There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly." *Richardson v. State* (Fla. Dist. Ct. App. 2d Dist. 2001), 787 So.2d 906, 908.

> "The fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when

> they take those actions. It is that which strikes terror into the hearts of their victims. The fourth amendment protects us from that fear as much as it protects our privacy."

Becker, 23 F.3d at 1540 (quoting *United States v. Lockett* (9th Cir. 1990), 919 F.2d 585, 592 (Fernandez, J., concurring)).

¶23 In *Bamber,* the Florida Supreme Court explained that as a matter of policy, no-knock warrants are disfavored because of their staggering potential for violence to both the occupants of the residence and the police. *Bamber,* 630 So.2d at 1050.

> "[U]nannounced breaking and entering into a home could quite easily lead an individual to believe that his safety was in peril and cause him to take defensive measures which he otherwise would not have taken had he known that a warrant had been issued to search his home."

Bamber, 630 So.2d at 1052 (quoting *LaFave,* at 272). Several years later, the Florida Supreme Court also stated that

> [i]n failing to permit time for a response in executing a search warrant, the police follow a recipe for tragedy. . . . Awakening citizens from slumber and depriving them of an opportunity to recognize law enforcement's presence and purpose could result in a misunderstanding with horrific consequences.

Richardson, 787 So.2d at 909.

¶24 The Illinois Supreme Court has also recognized that unexpected and unannounced entries actually create, rather than prevent, deadly encounters between police and

citizens. *Condon,* 592 N.E.2d at 957. Other states and circuits are in accord and have emphasized that a legitimate purpose of knocking and announcing is to protect the safety of all involved. *See State v. Curtis* (Tenn. Crim. App. 1997), 964 S.W.2d 604, 609; *Becker,* 23 F.3d at 1540; *United States v. Dice* (6th Cir. 2000), 200 F.3d 978, 982.

¶25 Because the Fourth Amendment protects property as well as privacy, another purpose of the knock and announce rule is to prevent the needless destruction of property. *Dice,* 200 F.3d at 982. "[Q]uite obviously a person should ordinarily 'be allowed the opportunity to voluntarily admit the officer into his home' instead of suffering damage to his property." *Bamber,* 630 So.2d at 1052 (quoting *LaFave,* at 273).

¶26 In evaluating the scope of the Fourth Amendment right to be free from unreasonable searches and seizures, the United States Supreme Court in *Wilson v. Arkansas* (1995), 514 U.S. 927, 931, 115 S.Ct. 1914, 1916, 131 L.Ed.2d 976, looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing of the Fourth Amendment. In doing so, the Supreme Court noted that

> [a]lthough the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment. An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.

Wilson, 514 U.S. at 931, 115 S.Ct. at 1916 (internal citations omitted).

¶27 After Sharlene Wilson made several narcotics sales to an informant, law enforcement officers with the Arkansas State Police obtained warrants to arrest her and search her home. The affidavit in support of the warrants stated that Wilson's housemate, Bryson Jacobs, had previously been convicted of arson and firebombing. On the afternoon of the search, the officers found the main door to Wilson's home open. As the officers opened an unlocked screen door and entered the residence, they identified themselves as police officers and stated that they had a warrant. They found Wilson in the bathroom flushing marijuana down the toilet. Wilson and Jacobs were arrested and charged with possession and distribution of marijuana and methamphetamine. *Wilson,* 514 U.S. at 929-30, 115 S.Ct. at 1915-16.

¶28 Prior to trial, Wilson filed a motion to suppress the evidence seized during the search on various grounds including that the search was invalid because the officers failed to knock and announce their presence prior to entering the home. The trial court summarily denied the suppression motion. Wilson appealed to the Arkansas Supreme Court arguing that the Fourth Amendment requires officers to knock and announce prior to entering a residence. That court rejected Wilson's argument and affirmed her conviction on appeal. The United States Supreme Court granted certiorari to resolve the conflict among the lower courts as to whether the common law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry. The Supreme Court held that it did. *Wilson,* 514 U.S. at 930, 115 S.Ct. at 1916.

¶29 In making this determination, the Supreme Court examined in *Wilson* the history of the common law knock and announce rule noting that although common law generally protected a man's house as "his castle of defense and asylum," common-law courts long held that the sheriff, acting on behalf of the King, could enter a man's house to arrest him "or to do other execution of the K[ing]'s process," but only after signifying the cause of his coming and requesting that the doors be opened. *Wilson,* 514 U.S. at 931, 115 S.Ct. at 1916 (citing 3 W. Blackstone, *Commentaries; Semayne's Case* (K.B. 1603), 5 Co. Rep. 91a, 91b, 77 Eng.Rep. 194, 195-96).

> [Before the sheriff may enter a man's house], he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it. . . .

Wilson, 514 U.S. at 931-32, 115 S.Ct. at 1916-17 (quoting *Semayne's Case,* 5 Co. Rep. at 91b, 77 Eng.Rep. at 195-96). The Supreme Court noted that the knock and announce principle appears to predate even *Semayne's Case,* which is usually cited as the judicial source of the common-law standard. "*Semayne's Case* itself indicates that the doctrine may be traced to a statute enacted in 1275, and that at that time the statute was 'but an affirmance of the common law.'" *Wilson,* 514 U.S. at 932 n.2, 115 S.Ct. at 1917 n.2 (quoting *Semayne's Case,* 5 Co.Rep. at 91b, 77 Eng.Rep. at 196).

¶30 The Supreme Court noted in *Wilson* that several prominent founding-era commentators agreed on the basic principle of knock and announce:

> According to Sir Matthew Hale, the "constant practice" at common law was that "the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door." See 1 M. Hale, Pleas of the Crown 582. William Hawkins propounded a similar principle: "the law doth never allow" an officer to break open the door of a dwelling "but in cases of necessity," that is, unless he "first signify to those in the house the cause of his coming, and request them to give him admittance." 2 W. Hawkins, Pleas of the Crown, ch. 14, § 1, p. 138 (6th ed. 1787). Sir William Blackstone stated simply that the sheriff may "justify breaking open doors, if the possession be not quietly delivered." 3 Blackstone 412.

Wilson, 514 U.S. at 932-33, 115 S.Ct. at 1917. In addition, most of the states that ratified the Fourth Amendment enacted constitutional provisions or statutes generally incorporating English common law and a few states enacted statutes specifically embracing the common-law view that the breaking of the door of a dwelling was permitted once admittance was refused. *Wilson,* 514 U.S. at 933-34, 115 S.Ct. at 1917.

¶31 The *Wilson* Court further noted that while the common law principle of announcement is "embedded in Anglo-American law," the Court had never before squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. However, the Supreme Court determined in *Wilson* that

> [g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of search and seizure.

Wilson, 514 U.S. at 934, 115 S.Ct. at 1918. Hence, the Court held that the common-law knock and announce principle does form a part of the Fourth Amendment reasonableness inquiry. *Wilson,* 514 U.S. at 934, 115 S.Ct. at 1918.

¶32 The Court further held, however, that not every entry must be preceded by an announcement. Rather,

> [t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. . . . [T]he common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.

Wilson, 514 U.S. at 934, 115 S.Ct. at 1918 (citing *Ker v. California* (1963), 374 U.S. 23, 38, 83 S.Ct. 1623, 1632, 10 L.Ed.2d 726). While early common law did not require announcement in certain circumstances including felony arrests, that principle was gradually applied to cases involving felonies, yet the courts acknowledged that the presumption in favor of announcement necessarily would give way to countervailing law enforcement interests. Those interests included circumstances presenting a threat of physical harm to officers, the fact that an officer is pursuing a recently escaped arrestee, and where officers

have reason to believe that evidence would likely be destroyed if advance notice were given.

¶33 However, rather than giving a "comprehensive catalog" of the relevant countervailing factors, the *Wilson* Court left to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. The Court simply held that although a search and seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry. *Wilson,* 514 U.S. at 936, 115 S.Ct. at 1919. Consequently, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances present which would present a threat of physical violence or the likelihood that evidence would be destroyed if the rule were not followed. *United States v. Dupras* (D. Mont. 1997), 980 F.Supp. 344, 347 (citing *Richards v. Wisconsin* (1997), 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615).

Exigent Circumstances

¶34 Exigent circumstances have been defined as

> "those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

United States v. Zermeno (9th Cir. 1995), 66 F.3d 1058, 1063 (quoting *United States v. McConney* (9th Cir. 1984), 728 F.2d 1195, 1199, *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984)). The government bears the burden of proving that exigent circumstances existed. *United States v. Bates* (6th Cir. 1996), 84 F.3d 790, 794. An unjustified yet sincere belief in exigent circumstances does not justify non-compliance with the knock and announce rule. *United States v. Mendonsa* (9th Cir. 1993), 989 F.2d 366, 370 (citing *McConney,* 728 F.2d at 1206). Unless exigent circumstances exist, the failure of law enforcement officers to knock and announce their presence will render the evidence procured during the ensuing execution of the search warrant inadmissible. *Bates,* 84 F.3d at 795.

¶35 There are two types of exigencies, those that are foreknown and those unexpected that arise on the scene. *Dupras,* 980 F.Supp. at 347. The determination of whether an unannounced entry is reasonable must be made under the particular circumstances of each case. *Dupras,* 980 F.Supp. at 347. In the case before us on appeal, all of the factors that officers actually deemed exigent were actually known well in advance of applying for the search warrant. The SWAT teams became involved in this investigation almost two weeks prior to applying for a search warrant. It was at that point that the decision was made that there would be a no-knock forcible entry into the house. The court issuing the search warrant was never apprized of that decision, nor were any exigent circumstances laid out to the court when the search warrant was applied for.

¶36 Moreover,

> while peril to officers or the possibility of destruction of evidence or escape may well demonstrate an exigency, mere unspecific fears about

> those possibilities will not. Were they enough, the knock and announce statute would have been judicially amended to exclude virtually all narcotics-based cases. It has not been.

Becker, 23 F.3d at 1541. In fact, in *Richards,* the Supreme Court held that the Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement in felony drug investigations. *Richards,* 520 U.S. at 394-95, 117 S.Ct. at 1421-22.

¶37 In *Richards,* law enforcement officers obtained a warrant to search Richards' motel room for drugs and related paraphernalia. One officer, dressed as a maintenance man, knocked on the door and stated that he was with maintenance. With the chain still on the door, Richards cracked it open, but slammed it closed again when he saw a uniformed officer standing behind the "maintenance man." After waiting two or three seconds, the officers kicked in the door. They claimed at trial that they identified themselves as police as they were kicking in the door. The officers caught Richards trying to escape through a window. They found cash and cocaine hidden in plastic bags in the bathroom ceiling. *Richards,* 520 U.S. at 388-89, 117 S.Ct. at 1418-19.

¶38 Richards sought to have the evidence from his motel room suppressed on the ground that the officers failed to knock and announce their presence prior to forcing entry into the room. The trial court denied the motion concluding that the officers could gather from Richards' behavior that he knew they were police officers and that he might try to escape or destroy evidence. The judge emphasized that the easily disposable nature of the drugs the police were searching for further justified the officers' decision to identify themselves as they crossed the threshold instead

of announcing their presence before seeking entry. The Wisconsin Supreme Court affirmed concluding that it was reasonable to assume that all felony drug crimes would involve "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police." *Richards,* 520 U.S. at 390, 117 S.Ct. at 1419 (quoting *State v. Richards* (1996), 201 Wis.2d 845, 549 N.W.2d 218, 219). Thus, the Wisconsin Supreme Court concluded that exigent circumstances justifying a no-knock entry are always present in felony drug cases, hence, police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation. *Richards,* 520 U.S. at 389-90, 117 S.Ct. at 1419-20.

¶39 The United States Supreme Court disagreed and determined that the Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement for felony drug investigations. Rather, the Supreme Court held that to justify a no-knock entry, police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit effective investigation of the crime by, for example, allowing the destruction of evidence. *Richards,* 520 U.S. at 394-95, 117 S.Ct. at 1421-22.

¶40 The Supreme Court also held that creating exceptions to the knock-and-announce rule based on the "culture" surrounding a general category of criminal behavior presented two serious concerns: (1) the exception contains considerable overgeneralization as not every drug investigation poses substantial risks to the officers' safety and the preservation of evidence; and (2) the reasons for creating an exception in one category can, relatively easily,

be applied to others and thereby render meaningless the knock-and-announce element of the Fourth Amendment's reasonableness requirement. *Richards,* 520 U.S. at 392-94, 117 S.Ct. at 1420-21.

¶41 Although the Supreme Court rejected the Wisconsin court's blanket exception to the knock and announce requirement in *Richards,* the Supreme Court agreed with the trial court that on the facts of that case, it was reasonable for the officers to believe that Richards knew, after he opened the door, that the men seeking entry to his room were the police and that once the officers reasonably believed that Richards knew who they were, it was reasonable for them to force entry immediately given the disposable nature of the drugs. *Richards,* 520 U.S. at 395, 117 S.Ct. at 1422.

¶42 We next discuss those factors that may present exigent circumstances obviating the necessity to knock and announce.

A. Safety concerns

¶43 Exigent circumstances cannot be predicated upon general fears of the officers executing a search warrant in a narcotics investigation. *Zermeno,* 66 F.3d at 1063. While peril to officers may well demonstrate an exigency, mere unspecific fears about that possibility will not. *Becker,* 23 F.3d at 1541; *United States v. Moore* (10th Cir. 1996), 91 F.3d 96, 98. In *Moore,* the Tenth Circuit Court of Appeals stated:

> The mere statement that firearms are present, standing alone, is insufficient. The government must go further and demonstrate that the presence of firearms raised a concern for the officers'

> safety. . . . [O]fficers are concerned about an armed response when they execute *any* narcotics search warrant. Clearly, though, to expand the exigent circumstances exception to that extent would completely swallow the rule.

Moore, 91 F.3d at 98 (internal citations omitted).

¶44 Hence, a mere suspicion that weapons would be at a residence does not provide an exigency for the officers' failure to properly knock and announce their presence. "Our cases have made it clear that generalized fears about how drug dealers usually act or the weapons that they usually keep is not enough to establish exigency." *United States v. Granville* (9th Cir. 2000), 222 F.3d 1214, 1219. Evidence that firearms are within the residence or that a particular defendant is armed is not by itself sufficient to create an exigency. *Becker,* 23 F.3d at 1541; *United States v. Marts* (8th Cir. 1993), 986 F.2d 1216, 1218. There must be specific information to lead the officers to a reasonable conclusion that the presence of firearms raises concerns for the officers' safety. *Moore,* 91 F.3d at 98. Furthermore,

> [t]he presence of a weapon creates an exigent circumstance, provided the government is able to prove they possessed information that the suspect was armed and likely to use a weapon or become violent. Evidence that firearms are within a residence, by itself, is not sufficient to create an exigency to officers when executing a warrant. However, threats to an officer's safety, a criminal record reflecting violent tendencies, or a verified reputation of a suspect's violent nature can be enough to provide law enforcement officers with justification to forego the necessity of knocking and announcing their presence.

Bates, 84 F.3d at 795 (internal citations omitted). "A concern for police safety must be based upon prior knowledge or direct observation that the subject of the search keeps weapons *and* that such person has a known propensity to use them." *State v. Valentine* (Ohio Ct. App. 1991), 598 N.E.2d 82, 85 (emphasis in original) (quoting *State v. Jeter* (Wash. 1981), 634 P.2d 312, 314).

¶45 In the case *sub judice,* the officers had no information that any of the occupants of the house possessed weapons. Officer Nichols had information that a person matching Klein's description had purchased ammunition. However, even after months of surveillance, Officer Nichols had no information of weapons being in the residence and no report of anyone seeing any of the occupants of the house, including Klein, with weapons. There was no testimony indicating that any of the occupants of the house were prone to violence or the use of weapons or had ever made threats against law enforcement officers.

¶46 Prior to initiating the raid, Sergeant Bardwell completed a risk analysis report intended to assess the risk associated with specific individuals who the officers anticipate might be present during a raid. Sergeant Bardwell testified that Klein was the only person considered in conjunction with the risk analysis assessment and the only person about whom Sergeant Bardwell had any information prior to the raid. Sergeant Bardwell agreed that the only criterion that applied to Klein from the risk analysis checklist was that he was on probation or parole for a nonviolent offense. Sergeant Bardwell testified that he had no concrete evidence to substantiate the assumption that there might be weapons in the house. Sergeant Bardwell also agreed that there was no record or information of Klein ever being violent; having any violent criminal

record; resisting arrest or assaulting a police officer; possessing weapons; being mentally unstable; using drugs or alcohol; having a military or police background; or being associated with any organization suspected of violent criminal activity. Sergeant Bardwell further stated that he had no information regarding the identities, characteristics or background of any other individuals in the house.

¶47 While Officer Nichols' later investigation revealed that several occupants of and visitors to the house had criminal backgrounds involving violent offenses, that information cannot now be used to justify the officers' no-knock entry into Appellants' house. "[I]n determining the lawfulness of entry and the existence of probable cause, we may concern ourselves only with what the officers had reason to believe *at the time of their entry.*" *United States v. Ramirez* (1998), 523 U.S. 65, 71 n.2, 118 S.Ct. 992, 997 n.2, 140 L.Ed.2d 191 (quoting *Ker,* 374 U.S. at 40-41 n.12, 83 S.Ct. at 1634 n.12) (emphasis in original). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *United States v. Banks* (2003), 540 U.S. 31, 39, 124 S.Ct. 521, 527, 157 L.Ed.2d 343 (quoting *Graham v. Connor* (1989), 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443).

¶48 The State claims that another factor in determining exigency under the safety exception is the inherent danger in methamphetamine labs. In this case, although Officer Nichols expressed concerns regarding the safety of neighborhood residents, he made no attempt to evacuate any residences. In fact, Officer Reinschmidt, who was conducting surveillance from a house directly across the street from Appellants' residence, did not request the residents of the house she was using for surveillance to

leave while the surveillance and the raid were being conducted.

¶49 Additionally, Officer Reinschmidt testified that after she saw some activity in Appellants' driveway and heard someone yell to go inside and cut the lights, she saw no other suspicious activity in the house. Officer Reinschmidt further testified that although she saw some movement in the kitchen, the house was quiet and her observations were entirely consistent with the residents preparing to retire for the night.

¶50 Furthermore, as the officers approached the house to execute the search warrant, they did not detect any activity or hear anything consistent with attempts to escape, resist arrest, barricade the doors, destroy evidence or dismantle the meth lab. There was no indication that any of the occupants of the house had detected the officers' presence or anticipated an invasion.

B. Futility

¶51 The futility exception to the knock and announce rule excuses the knock and announce requirement where police officers have a reasonable suspicion that the occupants know of the presence and purpose of the police prior to their entry into the residence. *See Bates,* 84 F.3d at 795 (exigent circumstances exist when the occupants already know of the officers' authority and purpose); *United States v. Dunnock* (4th Cir. 2002), 295 F.3d 431, 435, *cert. denied,* 537 U.S. 1037, 123 S.Ct. 570, 154 L.Ed.2d 457 (2002) (futility exception applied where person arrested outside of his home had notice of the authority and purpose of the officers executing the search warrant).

¶52 In *United States v. Peterson* (9th Cir. 2003), 353 F.3d 1045, the Ninth Circuit Court of Appeals addressed this exception to the knock and announce rule. Just before SWAT team members were ready to knock on Peterson's door to serve a search warrant, one of the occupants of the residence opened the door. Recognizing the group of people he saw on the porch to be police officers, he attempted to close the door as one of the officers shouted "Police, with a search warrant." The officers then forced the door open. On appeal, Peterson argued that the officers' entry of his residence was unreasonable under the Fourth Amendment. *Peterson,* 353 F.3d at 1047-48.

¶53 The Ninth Circuit concluded that the officers' no-knock entry was justified on the grounds of futility, destruction of evidence and danger. In addressing the issue of futility, the Ninth Circuit stated that

> the SWAT team originally intended to announce its presence. However, just as this announcement was about to be made, Edwards unexpectedly opened the door, saw that police were outside, and attempted to deny them entry. Were we to hold that the police were required to announce their presence in this case and wait some further period of time while the occupants reconsidered whether to admit or resist them, it would amount to mandating a meaningless act. Announcement would have been futile. *Just as one cannot close a door that is already closed, one cannot "announce" a presence that is already known.*

Peterson, 353 F.3d at 1049 (emphasis added).

¶54 The Tenth Circuit Court of Appeals determined in *Moore,* that while executing a warrant, police officers could not claim that they were constructively refused

admittance to a residence so as to permit forcible entry where forced entry was "virtually instantaneous" with the officers' announcement of their presence and authority. *Moore,* 91 F.3d at 98.

¶55 In the present case, the State conceded in oral argument that the futility exception was not applicable in this case. Sergeant Bardwell testified that the presence of the surveillance camera was not a consideration in planning the no-knock raid, since the speed of entry would undermine the effectiveness of any surveillance. Sergeant Bardwell also observed that entry into the house could be planned in such a manner as to avoid the surveillance camera. In fact, the SWAT teams approached the house from the north and west, thereby effectively remaining outside of the range of the surveillance camera. Additionally, the raid was conducted at night and the officers had no information that the camera was operational, especially in the dark.

¶56 Moreover, Sergeant Bardwell testified that the existence of counter-surveillance was important only to the extent, "[t]hat if they have an operation that they deem the expense and trouble to put up counter-surveillance, it's probably a pretty substantial operation that they have."

¶57 The Illinois Supreme Court held in *Condon* that even if the occupants of the house had been aware of the police approaching via a surveillance camera, the State had offered no specific testimony that the occupants would have done anything violent or tried to escape. Thus, the Illinois Court held that the surveillance equipment did not constitute an exigent circumstance that relieved the police

of their responsibility to knock and announce. *Condon,* 592 N.E.2d at 956.

C. Destruction of evidence

¶58 We also conclude that in this case the possibility of destruction of evidence did not create an exigent circumstance justifying the no-knock entry into Appellants' house.

> The possibility that an individual may destroy drug evidence can also create exigent circumstances. However, the government must prove they had "a reasonable belief that the loss or destruction of evidence [was] imminent." The mere possibility or suspicion that a party is likely to dispose of evidence when faced with the execution of a search warrant is not sufficient to create an exigency.

Bates, 84 F.3d at 796 (internal citations omitted).

¶59 The larger the amount of drugs and the more complex the operation, the less likelihood there is that evidence will be destroyed during the period between the knock and announce and the subsequent entry. *See United States v. Tavares* (8th Cir. 2000), 223 F.3d 911, 917.

¶60 In this case, both Sergeant Bardwell and Undersheriff Curry testified that the mere fact that the residence contained a meth lab would not justify a no-knock entry. Moreover, Sergeant Bardwell testified that the potential for the destruction of the meth lab was not a concern in deciding to take on the assignment. Both Sergeant Bardwell and Undersheriff Curry agreed that a meth lab cannot be destroyed in a matter of five to ten seconds.

Conclusion

¶61 Under the Fourth Amendment and the federal authority cited above, the knock and announce rule applies in Montana the same as in our sister states. Even were it not for that authority, though, Article II, Sections 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution. *See Bullock,* 272 Mont. at 383-84, 901 P.2d at 75; *Siegal,* 281 Mont. at 262-63, 934 P.2d at 183; *Elison,* ¶¶ 46-47.

¶62 Accordingly, in our application of these constitutional provisions and authorities, we hold that, on the facts here, the forced entry into the Appellants' house and subsequent search was unreasonable under the Fourth Amendment and under Article II, Sections 10 and 11 of the Montana Constitution because the law enforcement authorities failed to knock and announce their presence before executing the search warrant. Here, the exigencies claimed by the State as justification for the no-knock entry were all foreknown by the authorities. Hence, we hold that the State failed to meet its burden to prove that exigent circumstances obviated the necessity to comply with the knock and announce rule.

¶63 Moreover, we agree with the Appellants that the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for search warrant. An investigating officer may, however, make this decision based on unexpected exigent circumstances that arise on the scene. When law enforcement officers contemplate a no-knock entry in executing a search warrant, that intention must be included in the

application for the search warrant along with any foreknown exigent circumstances justifying the no-knock entry. This approach is consistent with our prior jurisprudence – i.e., when the right to privacy must reasonably yield to an application to search, that decision should be made by a judicial officer, and not by the police. *State ex rel. Townsend v. District Court* (1975), 168 Mont. 357, 360, 543 P.2d 193, 195. And, the review of a search warrant application by an impartial magistrate ensures that a neutral and detached evaluation of the situation is interposed between the investigating officer and the private citizen. *State v. Wilson* (1994), 266 Mont. 146, 149, 879 P.2d 683, 684.

¶64 The knock and announce rule is a flexible one. Courts must determine whether an unannounced entry is reasonable under the particular circumstances of each case. *Richards*, 520 U.S. at 394, 117 S.Ct. at 1421. The time an officer must wait before using force to enter the house after knocking and announcing depends on the circumstances of each case. *McClure v. United States* (9th Cir. 1964), 332 F.2d 19, 22, *cert. denied*, 380 U.S. 945, 85 S.Ct. 1027, 13 L.Ed.2d 963 (1965).

¶65 In conclusion, we hold that the law enforcement officers' no-knock entry into Appellants' house to execute the search warrant violated Appellants' federal and state constitutional rights to be free from unreasonable searches and seizures. Consequently, the trial court erred in failing to suppress the evidence resulting from that search.

¶66 This cause is reversed and remanded for further proceedings consistent with this Opinion.

¶67 That said, the dissent has raised several contentions that deserve a response. First, the dissent faults the Court

for failing to rely more heavily on the United States Supreme Court's decisions in *Banks* and *Ramirez*. However, the dissents' concern in that regard is misplaced because the facts in both *Banks* and *Ramirez* are dissimilar from the facts in the instant case.

¶68 In the case *sub judice,* the officers failed to knock and announce their presence. In *Banks,* not only did the officers knock and announce their presence, they waited 15 to 20 seconds before forcibly entering the residence. There the Supreme Court did not analyze whether it was proper for the officers to knock and announce, but whether the 15-to-20-second wait was reasonable. The Supreme Court even stated in *Banks* that "[t]here has never been a dispute that these officers were *obliged* to knock and announce their intentions when executing the search warrant. . . ." *Banks,* 540 U.S. at 35, 124 S.Ct. at 524 (emphasis added).

¶69 Moreover, the reason the Supreme Court determined that the 15-to-20-second wait was reasonable in *Banks* was because of the easily disposable nature of the cocaine. *Banks,* 540 U.S. at 38, 124 S.Ct. at 526. Hence, the exigency the Supreme Court relied on in *Banks* to uphold the search was the opportunity to get rid of the cocaine. In the instant case, the not so easily disposable nature of the methamphetamine lab removed that particular exigency.

¶70 Likewise, *Ramirez* is also dissimilar from the instant case. In *Ramirez,* officers obtained a "no-knock" warrant granting them permission to enter and search Ramirez's home for an escaped prisoner who was reported to have made threats to kill witnesses and police officers. It was also believed that the escapee had access to a large supply of weapons. *Ramirez,* 523 U.S. at 68, 118 S.Ct. at 995.

Unlike the instant case, the question before the Supreme Court in *Ramirez* was whether the Fourth Amendment holds officers to a higher standard when a "no-knock" entry results in the destruction of property. The Supreme Court held that it did not. *Ramirez,* 523 U.S. at 68, 118 S.Ct. at 995.

¶71 Second, the dissent faults the Court for not placing more significance on the presence of the surveillance cameras. While the dissent quotes Officer Bardwell's testimony regarding his concerns about the cameras, the dissent fails to note the most significant observation of Officer Bardwell, that the officers could approach the house outside of the view of the cameras and thus remain undetected, thereby rendering the cameras useless.

¶72 Finally, the dissent objects to our analysis complaining that we have taken the "totality" out of "totality of the circumstances." Contrary to the dissents' contention, in order to examine the "totality" of the circumstances, each circumstance must first be considered on its own strength. In *People v. Condon* (Ill. 1992), 592 N.E.2d 951, *cert denied,* 507 U.S. 948, 113 S.Ct. 1359, 122 L.Ed.2d 738 (1993), the Illinois Supreme Court was faced with a case factually similar to the case before us on appeal including that the residence to be searched had two closed circuit television cameras along with a police scanner to monitor traffic near the residence. The court in *Condon* expressed its disagreement with the State's argument that if the circumstances were viewed synergistically, they must constitute exigent circumstances.

> While there is a certain appeal to the State's argument, we cannot agree that just because there are a number of circumstances, not one of which standing alone would create an exigency, the

> sheer volume of circumstances without something more is sufficient to create exigent circumstances.

Condon, 592 N.E.2d at 955. Instead, the court stated that "[w]e must necessarily deal with each potential exigent circumstance individually, since the individual circumstances equal the totality." *Condon,* 592 N.E.2d at 955. We agree with the reasoning of the Illinois Supreme Court because, simply put, zero plus zero can never equal one. *State v. Giant,* 2001 MT 245, ¶ 39, 307 Mont. 74, ¶ 39, 37 P.3d 49, ¶ 39.

/s/ James C. Nelson
Justice

We Concur:

Chief Justice

/s/ Patricia Cotter

/s/ Jim Regnier

/s/ W. William Leaphart

Justices

Justice Jim Rice dissenting.

¶73 I respectfully dissent. I appreciate the Court's effort in analyzing this issue of first impression, but, in my view, the Court has overlooked or failed to emphasize superior precedent which would require a different outcome when

applied to the facts here. Although discussing the United States Supreme Court's decisions in *Wilson* and *Richards* at some length, the Court makes only a single, passing reference to each of the Supreme Court's two most recent decisions regarding this issue, *United States v. Ramirez* and *United States v. Banks*.[1] The Court appears to have eschewed these holdings in favor of holdings from other state courts and United States Circuit Court decisions, particularly the Ninth Circuit. Though I take no issue with citing to the Ninth Circuit generally, it bears mention, and consideration, that the Ninth Circuit Court's analytical approach to this issue has been criticized and its holdings have been overruled by the high court. The Supreme Court has provided instruction that I would apply to this case.

¶74 I begin with the standard of review. The Court cites to the Ninth Circuit Court's holding in *United States v. Furrow* for the proposition that *de novo* review is exercised on search warrant exigency issues. *See* ¶ 18. *Furrow* did not establish that standard, but simply restated the standard which, after analysis, had been adopted by the Ninth Circuit in *United States v. McConney* (9th Cir. 1984), 728 F.2d 1195. *Furrow*, 229 F.3d at 811. A review of *McConney's* holding reveals that the Ninth Circuit's *de novo* standard is significantly different than the *de novo* review we have previously exercised. Beginning with our Court, we have held:

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[1] *Banks* dealt with a forceful entry by police some fifteen to twenty seconds following their "knock and announce." The Court stated that the "same criteria bear on when the officers could legitimately enter after knocking" as those for "dispensing with a knock and announcement" altogether. *Banks*, 540 U.S. at 35.

> We review a district court's denial of a motion to suppress "to determine whether the court's findings of fact are clearly erroneous and whether its interpretation and application of the law are correct." *State v. Meyer,* 2004 MT 272, 323 Mont. 173, 99 P.3d 185.

State v. DeWitt, 2004 MT 317, ¶ 21, 324 Mont. 39, ¶ 21, 101 P.3d 277, ¶ 21. Further, regarding exigent circumstances, we have held:

> Whether the factual circumstances determined by a district court constitute exigent circumstances is a conclusion of law reviewed for correctness. *State v. Saxton,* 2003 MT 105, ¶ 19, 315 Mont. 315, ¶ 19, 68 P.3d 721, ¶ 19.

State v. Lanegan, 2004 MT 134, ¶ 11, 321 Mont. 349, ¶ 11, 91 P.3d 578, ¶ 11.

¶75 The Ninth Circuit's "*de novo* review," as adopted in *McConney* and reiterated in *Furrow,* is something quite different than our Court's review "anew" of the trial court's conclusions of law for correctness. The Ninth Circuit's review is premised on its determination that exigent circumstances questions are mixed questions of law and fact. Its analysis, in part, is as follows:

> In summary, to classify mixed questions of law and fact for standard of review purposes, we adopt a functional analysis that focuses on the nature of the inquiry required when we apply the relevant rule of law to the facts as established. The analysis is not a precise one and does not offer any litmus test by which all mixed questions can be neatly categorized. It does not "unerringly distinguish between findings of fact and conclusions of law." *Pullman-Standard v. Swint,* 456

U.S. 273, at 289 n.19, 102 S.Ct. at 1790 n.19. Nonetheless, we think that if we focus on the nature of the inquiry required in determining whether the established facts fall within the relevant legal definition, we employ a neutral test that accurately reflects the concerns that properly underlie standard of review jurisprudence.

III

Applying our functional analysis to the case at hand, we conclude that the mixed question of exigent circumstances is reviewable de novo as a question of law, and, consequently, we overrule *Flickinger*. Our reason is this: to decide if the facts satisfy the legal test of exigency – whether, judged by an objective standard, "there [was] a likelihood that the occupants [would] attempt to escape, resist, destroy evidence, or harm someone within," *United States v. Bustamante-Gamez,* 488 F.2d 4, 12 (9th Cir. 1973), *cert. denied,* 416 U.S. 970, 40 L.Ed.2d 559 (1974), – necessarily involves us in an inquiry that goes beyond the historical facts.

The mixed question of exigency is rooted in constitutional principles and policies. Like many such mixed questions, its resolution requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests. In particular, its resolution requires that we strike a balance between two sometimes conflicting societal values – the safety of law enforcement officers and fourth amendment privacy interests. The essential and difficult question raised by this balancing is how

much risk police officers can reasonably be expected to assume before disregarding the rules society has adopted to otherwise circumscribe the exercise of their considerable discretionary authority in carrying out their vital law enforcement duties.

This is a question that no amount of fact-finding will answer. The inquiry requires us to ask not merely whether the trial judge was correct in finding that Olson in fact had reason to believe, for instance, that McConney was a member of the Hell's Angels Motorcycle Club or that he had a prior felony conviction; it also requires a determination whether these facts and any other information Olson had about McConney's past are sufficient to satisfy the legal standard for exigency. We must decide, for instance, whether a reasonable belief that a suspect is a member of the Hell's Angels Club, without demonstration of a link to criminal activity, is relevant to the issue of exigency, *cf. United States v. Rubio,* 727 F.2d 786 at 793 (9th Cir. 1983) (membership in Hell's Angels without a link to actual criminal activity insufficient to support a finding of probable cause to issue a search warrant). We must also decide how much weight may be given to an officer's knowledge that a suspect has previously been convicted of an unspecified felony.

When, as here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the district judge's determination independently.

> In conclusion, we hold that the mixed question of exigent circumstances is not reviewable under the clearly erroneous test because it is not, like the question of intent, essentially factual. We do not at this juncture decide how any other mixed question should be reviewed. We do, it is true, adopt a functional analysis for the resolution of these questions. But our approach is an ad hoc one, permitting individual analysis and classification of each type of mixed question. Under it, we need only decide that the question of exigent circumstances is subject to de novo review.

McConney, 728 F.2d at 1204-05.

¶76 Rather than import the Ninth Circuit's "mixed question" analysis, and all that comes with it, I would retain our previously applied *de novo* review of warrant exigency questions – that is, approaching the issue as a legal conclusion reviewed for correctness and exercising deferential review on related factual questions, as we stated in *Lanegan* and *DeWitt.*

¶77 Turning to the merits, the Court correctly notes that the "no-knock" rule adopted by the United States Supreme Court in *Richards* is a "flexible one," and that courts must determine whether an unannounced entry is reasonable under the particular circumstances of each case. However, the Court then concludes that, under the facts here, officers violated the defendants' federal and state constitutional rights by failing to knock and announce. *See* ¶¶ 64-65. In this regard, I will begin by discussing amplifications of the *Richards* rule which have been announced, believing these to be necessary for proper resolution of the issue.

¶78 First, *Richards* held that, although police should be required to make the necessary showing whenever the reasonableness of a no-knock entry is challenged, the showing itself is "not high." *Richards,* 520 U.S. at 394-95; *see also United States v. Diehl* (1st Cir. 2002), 276 F.3d 32, 44, *cert. denied, Diehl v. United States* (2002), 537 U.S. 834, 123 S.Ct. 193, 154 L.Ed.2d 52 ("This burden is not large and the version of the record favoring the trial court's ruling governs."). Further, it is not necessary to establish a level of proof satisfying the probable cause standard. *Richards,* 520 U.S. at 394; *see also United States v. Grogins* (4th Cir. 1998), 163 F.3d 795, 797 (reversing the district court's suppression of evidence because "the district court's scrutiny approximated, if it did not exceed, the probable cause standard. The Supreme Court has expressly rejected this standard with respect to forgoing knocking and announcing" and citing *Richards.*)

¶79 Indeed, the *Richards* "reasonable suspicion" standard is the same standard applied for the reasonableness of an investigative stop. *Richards,* 520 U.S. at 394 (citing *the Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, stop and frisk standard); *see also United States v. Banks* (2003), 540 U.S. 31, 42, 124 S.Ct. 521, 528, 157 L.Ed.2d 343, 355-56 (in knock and announce case, applying investigative stop principles from *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740). Thus, the showing necessary for officers to initiate an investigative stop, a standard well established by our myriad of cases addressing that issue, is the standard we are to apply here. That standard provides helpful illustration about the kind and amount of information required to justify the officers' no-knock entry.

¶80 "Whether particularized suspicion supports an investigative stop is a question of fact that is analyzed in the context of the totality of the circumstances." *State v. Martinez,* 2003 MT 65, ¶ 23, 314 Mont. 434, ¶ 23, 67 P.3d 207, ¶ 23 (citing *State v. Pratt* (1997), 286 Mont. 156, 161, 951 P.2d 37, 40). "[I]n order for the State to prove the existence of particularized suspicion, the State must show: (1) objective data from which an experienced officer can make certain inferences; and (2) a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity." *State v. Gopher* (1981), 193 Mont. 189, 194, 631 P.2d 293, 296. The *Richards* rule is consistent herewith, thereby satisfying both federal and state constitutional requirements: "In order to satisfy a 'no-knock' entry, police must have a *reasonable suspicion* that knocking and announcing their presence, *under the particular circumstances,* would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards,* 520 U.S. at 394 (emphasis added); *see also Ramirez,* 523 U.S. at 70. With these standards in mind, I turn to the circumstances of this case.

¶81 ***1. Nature of the crime investigated.*** Citing to *Richards'* holding that there can be no "blanket exceptions" to the knock-and-announce rule for felony drug investigations, the Court simply dismisses the nature of the crime here as irrelevant to the inquiry. *See* ¶ 39. This is an incorrect application of *Richards,* which also concluded that "[i]t is indisputable that felony drug investigations may frequently involve both" the threat of physical violence and the likelihood of destruction of evidence, and cited its previous discussions about these connections.

Richards, 520 U.S. at 391. *Richards* merely concluded that this connection could not justify a *blanket* exception to the knock-and-announce rule that would alleviate case-by-case evaluation. *Richards,* 520 U.S. at 391-92. However, contrary to this Court's analysis, the nature of the crime being investigated is nonetheless a key factor which must be considered by police. " '[T]he law has uniformly recognized that substantial dealers in narcotics possess firearms' and that 'entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers.' " *United States v. Kennedy* (4th Cir. 1994), 32 F.3d 876, 882 (citing *United States v. Bonner* (D.C. Cir. 1989), 874 F.2d 822, 824). In *Banks,* the Supreme Court recognized that the police's approach to a house to execute a search warrant for cocaine may differ from their approach with a warrant for a stolen piano. "Police seeking a stolen piano may be able to spend more time to make sure they really need the battering ram." *Banks,* 540 U.S. at 41.

¶82 Here, police were not seeking a stolen piano. They were executing a felony drug warrant. The Court fails to consider this distinction, but more, also dismisses the significance of the kind of drugs involved here – a methamphetamine laboratory. The Court should well know by now that "meth labs" are inherently unstable and dangerous, presenting this additional danger to officers. Nonetheless, the Court concludes this factor is not relevant to the inquiry because police "made no attempt to evacuate any residences." *See* ¶ 48. Unfortunately, the dismissal of this concern by the Court does not accurately reflect the evidence in the record. To the contrary, Officer Bardwell testified that the situation here – "a meth lab with multiple suspects and they had warrants" – weighed significantly in his mind. The District Court specifically

found that "a methamphetamine laboratory was in the residence to be searched, which presented a high hazard level." The Court improperly concludes this evidence has no bearing – on the basis of its own evaluation.

¶83 ***2. Purchase of ammunition by Klein.*** Citing authority for the proposition that "[e]vidence that firearms are within the residence or that a particular defendant is armed is not *by itself* sufficient to create an exigency," *see* ¶ 44 (emphasis added), the Court dismisses the evidence of Klein's ammunition purchase as insufficient to constitute exigency. I do not disagree with the cited authority, only the Court's application of it. Klein's ammunition purchase may *by itself* have been insufficient to establish an exigency, but that did not render this evidence irrelevant to the inquiry. The Court reasons as if the evidence did not exist or was completely inconsequential. To the contrary, Officer Bardwell testified that evidence of the ammunition purchase by Klein, a fugitive felon, was significant to his analysis, and the District Court found this fact to be significant.

¶84 The Court rejects the District Court's finding, and instead engages in a "no existence" analysis; that is, it repeatedly focuses on the evidence which the police did *not* have, a tactic the Court uses throughout the opinion. *See also* ¶ 50. Here, because the police had "no information" about whether the occupants were armed and "no information" about weapons being in the house, the Court concludes that the ammunition purchase by Klein is simply immaterial. *See* ¶ 45. This is a faulty inquiry. The proper focus in determining reasonable suspicion is what police *did* observe, and whether "an experienced police officer can make certain inferences" therefrom. *Gopher,* 193 Mont. at 194, 631 P.2d at 296. Thus, I disagree with the Court's

conclusion about this evidence. Purchase of ammunition by a fugitive felon who is associating with a group operating a meth lab is not a "mere unspecific fear," *see* ¶ 43, and this is another fact that should be properly considered.

¶85 ***3. The video surveillance camera.*** Under the opinion's section entitled "Futility,"[2] the Court discards the evidence regarding the surveillance camera because "Sergeant Bardwell testified that the presence of the surveillance camera was not a consideration in planning the no-knock raid, since the speed of entry would undermine the effectiveness of any surveillance." *See* ¶ 55. Here, the Court illogically reasons that because the surveillance camera would be rendered ineffective by the speed of the no-knock entry, the camera was therefore not a factor to be considered in justifying the no-knock entry. Obviously, the camera would not have been rendered ineffective but for the no-knock entry. In addition to this error in logic, the Court again critically misapprehends Officer Bardwell's testimony. Officer Bardwell offered testimony to the precisely opposite conclusion about the significance of the surveillance camera:

> Defense: When you were planning the raid did you take the surveillance camera into consideration?
>
> Bardwell: When we did the raid; absolutely.
>
> Defense: When you were planning the raid did you plan around that surveillance camera?

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[2] The United States Supreme Court analyzes "futility" as a separate basis for a no-knock entry, not as a subcategory of exigency. *See Banks*, 540 U.S. at 37 n.3.

Bardwell: Not about any particular camera. We planned our raid, or considerations on the raid, that they had counter-surveillance, whether they had one camera or two cameras.

Defense: Okay. So it really didn't matter, then, in planning the raid that the surveillance cameras were there.

Bardwell: Oh, it mattered a lot; yeah.

Defense: How did it matter in terms of planning your raid?

Bardwell: That if they have an operation that they deem the expense and trouble to put up counter-surveillance, its probably a pretty substantial operation that they have.

. . . .

Defense: Did that fact have any bearing on your decision to make a no-knock entry in this case?

Bardwell: Actually it was a great deal.

Defense: It did.

Bardwell: Yes.

From this testimony, the District Court found that the presence of the camera was significant and indicated a substantial drug operation was inside the house. The Court simply disregards this evidence as worthless.

¶86 ***4. The number of suspects in the house and their criminal backgrounds.*** The Court focuses too narrowly on this issue, merely noting that Klein was "the

only person about whom Sergeant Bardwell had any information prior to the raid" and discussing only Klein. *See* ¶ 46. More accurately, Klein was the only person that Bardwell had noted on a risk assessment form prepared shortly before the raid, but, in any event, that was not the extent of the investigation. Other suspects were also investigated by officers. Officer Nichols' pre-entry investigation had revealed that the house was occupied by as many as fifteen individuals, including suspects with previous charges for carrying a concealed weapon, domestic assault, felony assault, and child rape. Another individual had been charged with four instances of domestic assault and a weapon violation, while still another had previously been charged with intimidation with a weapon, unlawful domestic imprisonment, and interference with domestic violence reporting. Information about the group was shared with Bardwell, and although he was not advised of all the prior charges, he was aware of the criminal involvement. This is significant evidence in support of a no-knock entry which the Court completely overlooks. Obviously, the suspects had a history of violence. Further, the number of suspects in the house, finally thought to be between six and eight at the time of the raid, raised concerns about officer safety and possible escape that led officers to pursue a no-knock entry.

¶87 ***5. Other factors.*** The evidence indicated various other factors considered by officers in deciding that a no-knock entry was necessary. One was that the house was a three-story structure with numerous rooms. Police expressed concern about timely securing such a large structure, particularly in light of the number of suspects. Another was the pre-raid incident when one of the suspects yelled for everyone to get inside and turn off the

lights, which prompted officers to move up the timing of the entry.

¶88 Additional factors could be analyzed, but this is enough. Clearly, there were specifically identifiable, objective factors which indicated to police that the situation required a no-knock entry. However, the Court, engaging in a "divide and conquer" analysis, systematically eliminates the effect of each factor. This is precisely the kind of analysis which the United States Supreme Court criticized when reversing the Ninth Circuit Court in *Banks*. The Court first recalled its holding in *Arvizu*, where it stated:

> We think that the approach taken by the [Ninth Circuit] Court of Appeals here departs sharply from [our] cases. The court's evaluation and rejection of seven of the listed [evidentiary] factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by [the officer] that was by itself readily susceptible to an innocent explanation was entitled to 'no weight.' [Citation omitted.] *Terry*, however, precludes this sort of divide-and-conquer analysis.

Arvizu, 534 U.S. at 274. The *Banks* Court then faulted the Ninth Circuit for failing to consider *Arvizu* in again systematically eliminating the factors offered by police in support of a no-knock entry:

> Nor did the appeals court cite *United States v. Arvizu*, 534 U.S. 266, 151 L.Ed.2d 740, 122 S.Ct. 744 (2002) (again, from the Ninth Circuit). There, we recently disapproved a framework for making reasonable suspicion determinations . . .

> by "describ[ing] and clearly delimit[ing]" an officer's consideration of certain factors [citation omitted]. Here, as in *Arvizu,* the Court of Appeals's overlay of a categorical scheme on the general reasonableness analysis threatens to distort the "totality of the circumstances" principle, by replacing a stress on revealing facts with resort to pigeonholes.

Banks, 540 U.S. at 42.

¶89 The Court here employs the same flawed analysis. It has proposed a "categorical scheme" which separates and pigeonholes the factors which the police here considered, thereby eliminating all of them. In effect, it has taken the "totality" out of "totality of the circumstances."

¶90 Police here were faced with executing a felony drug warrant in a large structure in which numerous suspects with violent criminal backgrounds were staying. One suspect was known to have purchased ammunition. The suspects had mounted a surveillance camera. A meth lab was housed in the structure, and the size of the structure would inhibit the ability of police to locate and secure the lab. The numbers of suspects known to be inside could present safety and escape concerns. Shortly before the raid, one suspect yelled suspiciously. From a consideration of the totality of these circumstances, I would conclude that police had objective data from which they could reasonably infer, and from which a reasonable suspicion would arise, that a no-knock entry was necessary.

¶91 Although I concur with the new rule adopted by the Court regarding a magistrate's approval of a no-knock entry, this procedure will not always resolve the issue. Circumstances may arise following the magistrate's

issuance of a warrant which may require a last minute, unapproved no-knock entry, as the Supreme Court has recognized:

> When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a "no-knock" entry. And even when executing a warrant silent about that, if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in.

Banks, 540 U.S. at 36-37. I would so note in the opinion.

¶92 Further, I would affirm the District Court.

/s/ Jim Rice
Justice

Chief Justice Karla M. Gray and Justice John Warner join in the dissent of Justice Rice.

/s/ Karla M. Gray
Chief Justice

/s/ John Warner
Justice

APPENDIX B

C.B. McNeil
District Judge
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MONTANA TWENTIETH JUDICIAL
DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, vs TANYA MARIE ANYAN, JAY LE CLEVELAND and TROY KLEIN, Defendants.	Cause No: DC-00-50 DC-00-44 DC-00-48 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This matter came on for hearing on June 10, 2002. The Defendants Tanya Marie Anyan, Troy Edward Klein and Jay Le Cleveland were present and were represented by their attorneys, John O. Putikka, Kristina Guest, and Carolyn S. Gill respectively. The State of Montana was represented by Robert L. Zimmerman, Sanders Count [sic] Attorney.

The Defendant has filed a Motion to Suppress, in each of said causes, of the evidence seized pursuant to a Search Warrant on July 25, 2001.

Testimony was taken and exhibits introduced into evidence. Based on the Court file, testimony presented,

exhibits introduced, and briefs previously filed, the Court makes the following:

FINDINGS OF FACT

1. That Christopher K. Nichols, a police officer with the City of Thompson Falls, Montana, was the case agent in this matter.

2. That prior to the application for and execution of the Search Warrant on July 25, 2001, Officer Nichols knew, or had information leading him to reasonably believe, the following:

a. That the residence to be searched was located in a residential area in Thompson Falls, Montana;

b. That surveillance cameras were mounted at the house and were pointing out towards the front yard and driveway; that the presence of such cameras indicated that a substantial operation was present;

c. That a resident of the residence to be searched had purchased ammunition at one of the local stores and thus it was probable that a firearm or firearms were in the residence;

d. That the potential of firearms being in the residence created the potential for a violent and dangerous situation when the warrant was executed;

e. That there were approximately eight people in the residence at the time it was searched;

f. That there were three floors and numerous rooms in the large residence;

g. That a methamphetamine laboratory was in the residence to be searched, which presented a high hazard level;

h. That there is a potential for explosion in a methamphetamine laboratory;

i. That in addition to the search warrant, the officers were also to execute an arrest warrant for one of the occupants of the house, the Defendant Klein, for a felony parole violation.

3. That Chris Nichols and the leaders of the two swat teams decided that the search warrant would be executed without knocking and announcing their presence.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over this matter. The incident occurred in Sanders County, Montana, and the defendants were charged with felonies. Article VII, Section 4, Montana Constitution; §46-2-101, MCA; §46-2-210, MCA; §3-5-302, MCA.

2. That this appears to be a case of first impression in Montana.

3. That Montana does not have any legislation dealing with the necessity to "knock and announce".

4. That the Court must analyze this question in light of the Fourth Amendment to the United States Constitution and the heightened expectation of privacy guaranteed to the citizens of Montana by the Montana Constitution.

5. That the United States Supreme Court established the test on this issue as follows:

> In order to justify a 'no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard – as opposed to a probable cause requirement – strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock execution of search warrants and the individual privacy interests affected by no-knock entries." *Richards v. Wisconsin*, 520 US 385, 137 L.Ed. 2d 615, 624, 117 S. Ct 1416 (1997).

6. That although the search and seizure language of the Montana Constitution mirrors the familiar language of the Fourth Amendment, the Montana Supreme Court repeatedly interprets the Montana Constitution to provide greater protection than that contained in the Fourth Amendment, *State v. Hardaway*, 2001 MT 252 ¶ 31, 307 Mont. 139, ¶ 31, 36 P.3d 900, ¶ 31; *State v. Elison*, 2000 MT 323, ¶ 45, 302 Mont. 228,¶ 45, 14 P.3d 456, ¶ 45.

7. That additionally, the Montana Constitution provides that the right of individual privacy shall not be infringed without a showing of a compelling state interest. *State vs. Bullock*, 272 Mont. 361, 383, 901 P.2d 61, 75 (1995) *citing* Mont. Const. Article II, §10. Accordingly, Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection than that afforded by the Fourth Amendment in cases involving searches of private property. *Elison* ¶ 46 *citing Bullock*, 272 Mont. At 384, 901 P.2d at 75 (other citation

omitted). Therefore, when analyzing search and seizure questions that specially implicate the right of privacy under Montana's Constitution, courts must consider and address both Section 10 and 11 of Article II of the Montana Constitution. *Hardaway*, 151 *citing* Larry M. Elison and Fritz Snyder, *The Montana Constitution, A Reference Guide*, page 52 and 54 (2001) (other citations omitted).

8. That an officer serving a search warrant must comply with the "knock and announce" requirement unless there are exigent circumstances present which would present a threat of physical violence or the likelihood that evidence would be destroyed if the rule were followed. *U.S. vs. Dupras* (*U.S. District Court for the District of Montana, Missoula Division*) 980 F. Supp. 344 (1997)).

9. That exigent circumstances are those circumstances that would cause a reasonable person to believe that a no-knock entry is necessary to prevent physical harm to the officers or to other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating the legitimate law enforcement efforts. *United States v. Hudson* 100 F. 3d 1409 (9th Cir. 1996).

10. That the tests must be administered based on the facts reasonably believed by the officers prior to the execution of the search warrant and not based on the facts as they appeared after the execution of the search warrant.

11. That the facts known to the officers and reasonably believed by the officers must be considered in their totality, not individually, when determining whether or not it was reasonable for the officers to not knock and announce.

12. That officer safety, neighborhood safety, and the safety of the occupants of the residence are circumstances to be considered as well when analyzing this issue.

13. That based on the totality of circumstances, and facts of this case, it was reasonable for the officers to believe that knocking and announcing would be dangerous to the officers or futile to the occupants of the house, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

14. That under the Montana Constitution, based on the totality of circumstances, and facts of this case, the no-knock entry was justified and the Defendants' heightened expectation of privacy was not violated.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER

The Defendants' motions to suppress the evidence are denied.

DATED this 31st day of July, 2002.

C. B. McNeil

C. B. McNeil
District Judge

APPENDIX C

Robert L. Zimmerman
Sanders County Attorney
PO Box 519
Thompson Falls, MT 59873
(406) 827-6903

MONTANA TWENTIETH JUDICIAL
DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, vs. TROY EDWARD KLEIN, Defendant	Cause No: DC-00-44 AFFIDAVIT OF OFFICER CHRIS NICHOLS

STATE OF MONTANA)
ss:
County of Sanders)

1. I am over the age of eighteen. I am competent to testify and have personal knowledge of the matters herein.

2. I am a law enforcement officer with the City of Thompson Falls, Montana.

3. I was the officer assigned to investigate this matter.

4. Troy Klein, as well as others, was developed as a suspect in this case.

5. My investigation revealed that Troy Klein lived in the residence at 205 Gallatin Street, Thompson Falls, Montana.

6. During the course of my investigation I learned that a male matching the description of Troy Klein and operating a motor vehicle, which I had identified as being utilized by Troy Klein, bought ammunition at a local Hardware Store.

7. During the course of my investigation I learned that there were three outstanding arrest warrants for Troy Klein.

8. I was aware that Troy Klein had been charged in the past with the offense of Unlawful Possession of a Firearm.

9. During the course of my investigation I learned that the following people frequented the residence:

a. Michael Grzogorek, who has been charged in the past with a crime of violence, Domestic Assault

b. George Coffey, who has been charged in the past with Carrying a Concealed Weapon

c. Sky Roseboom, who has been charged in the past with Felony Assault

d. Jason Hoy, who in the past has been charged with four instances of Domestic Assault and a Dangerous Weapon Violation

e. Richard Rose, who in the past has been charged with a crime of violence, Child Rape

f. Matthew Bradshaw, who has been charged with Intimidation with a weapon, three Domestic Assaults, Interfering with Reporting Domestic Violence and Unlawful Domestic Imprisonment

10. During the course of my investigation I discovered that there was a surveillance camera monitoring the outside of the residence.

11. Nightly patrols by the residence revealed that lights were on all night. This led me to believe that perhaps someone was awake all night and manning the surveillance camera monitor so that they could warn the occupants of the building if the police came to the residence.

12. When preparing for execution of the search warrant, I planned for as few as five persons or as many as fifteen people being inside the residence when the warrant was executed.

13. During the course of the investigation I became aware that the residence at 205 Gallatin Street is extremely large with multiple rooms, closets, and crawlspaces.

14. During the course of the investigation I became convinced that there was a Methamphetamine laboratory in the residence. This caused me concern about a possible explosion should the occupants have time to begin rapidly dismantling the lab. I felt that such a [sic] explosion presented a danger to the officers executing the search warrant, the occupants of the residence, and the occupants of the surrounding residences.

15. At 2:15 a.m. the car utilized by Troy Klein left the residence. It returned at 2:20 a.m. and the driver of the vehicle, believed to be Troy Klein, ordered everyone into the house and said to kill the lights. After this occurred there were people moving from the residence to vehicles parked at the residence. I felt our presence had been detected and decided at that time to search the residence as soon as possible. The search was conducted at 3:00 a.m.

16. I felt the occupants of the house could be destroying evidence, preparing for our entry into the residence by arming themselves or fortifying the residence

17. I displayed the search warrant to Troy Edward Klein after he was arrested and removed from the residence. This took place in the yard of the residence.

18. I personally saw the envelope or a copy of the envelope referred to on line five, page five of the application for the search warrant.

DATED this 2nd day of November, 2000.

/s/ Christopher K. Nichols
Chris Nichols Officer
Thompson Falls Police Department

SUBSCRIBED AND SWORN to before me this 2nd day of November, 2000.

/s/ Suzanne Cooperman
Notary Public for the State of Montana
Residing at Thompson Falls, Montana
My Commission Expires Jan 26, 2004

APPENDIX D

Robert L. Zimmerman
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(406) 827-6903

MONTANA TWENTIETH JUDICIAL
DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, vs. TROY EDWARD KLEIN, Defendant	Cause No: DC-00-44 AFFIDAVIT OF OFFICER SERGEANT ALLEN BARDWELL

STATE OF MONTANA)
ss:
County of Sanders)

1. I am over the age of eighteen. I am competent to testify and have personal knowledge of the matters herein.

2. I am a law enforcement officer with the Kalispell Police Department, Kalispell, Montana.

3. I assisted in the search of the residence at 205 Gallatin Street, Thompson Falls, Montana.

4. In preparation for that search I prepared a Risk Analysis Report. I cannot locate the Risk Analysis Report at this time.

5. Upon completion of the Risk Analysis it was my opinion that a no-knock entry was appropriate considering the situation confronting the search terms.

6. One of the risks was the possibility that the occupants of the house were guarding the laboratory by the use of the surveillance camera and would alert the other occupants of the approach of the search team. This would allow the occupants of the house time to destroy evidence, arm themselves, and/or fortify the residence.

7. When preparing the Risk analysis I was aware that one of the occupants of the residence had purchased ammunition. This led me to the reasonable suspicion that the occupants of the residence might be armed, thus causing concern for the safety of the officers as well as the occupants of the residence.

8. It was also my concern that by announcing our presence some of the evidence could have been destroyed.

9. Another risk factor was that law enforcement was aware that there were 6-8 people in the residence. When there are that many people in a large residence it is necessary and desirable, for officer safety and safety of the occupants, to gain control of the occupants as soon as possible. By knocking and announcing we might very well have lost the ability to gain control immediately. The occupants may have started running through the house and hiding in various locations. This would create a risk for all involved.

10. The search warrant was executed ahead of the scheduled time as we felt our presence had been detected and our plans compromised. This let [sic] to the reasonable suspicion that evidence might be destroyed, the occupants of the residence might arm

themselves and/or fortify the residence against our entry.

DATED this 6 day of November, 2000.

/s/ Allen Bardwell
Sergeant Allen Bardwell
Kalispell Police Department

AMER
RECORDS
AND
BRIEFS

(4)

SUPREME COURT, U.S.
FILED
APR 28 2005
OFFICE OF THE CLERK

No. 04-1318

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN, et al.

Respondents.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Troy Klein, by and counsel, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Respondent Klein has previously been declared indigent by the Sanders County District Court in Thompson Falls, Montana and the Montana Supreme Court. Respondent's counsel's affidavit in support of this motion is attached hereto.

Kristina Guest

KRISTINA GUEST
Assistant Appellate Defender
Counsel of Record and
Attorney for Respondent Klein
Appellate Defender Office
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DATED: April 28, 2005

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No. 04-1318

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN, et al.

Respondents.

AFFIDAVIT OF KRISTINA GUEST

STATE OF MONTANA)
)ss.
County of Lewis & Clark)

Kristina Guest, being duly sworn, deposes and states:

1. I am an attorney with the Appellate Defender Office.

2. I am employed by the State of Montana.

3. I am a member of the bar of this Court.

4. On August 13, 2001, Troy Klein filed a *pro se* Motion to Appeal *In Forma Pauperis* and Affidavit in Support of Motion to Proceed *In Forma Pauperis*.

5. Mr. Klein declared under oath that he possessed no cash, checking or savings accounts, real estate, stocks, bonds, notes, automobiles, or other valuable property.

6. The Honorable C.B. McNeil, the district court judge in Sanders County, Thompson

Falls, Montana, appointed the Montana Appellate Defender Office to represent Troy Klein on September 12, 2001.

7. The district court judge appointed the Appellate Defender Office after reviewing Mr. Klein's application to proceed *in forma pauperis*. Based on Mr. Klein's application, the court made a finding that Mr. Klein is "indigent and unable to employ counsel on his own behalf or to pay the costs and fees in connection with his appeal."

8. As an attorney for the Appellate Defender Office, I have represented Mr. Klein continuously since the district court's appointment of our office.

9. Mr. Klein was incarcerated continuously from the date of his arrest on July 25, 2000, until his release from incarceration, on January 21, 2005, after the Montana Supreme Court issued remittitur.

10. Mr. Klein has only been released from incarceration for four months. Mr. Klein remains indigent as he attempts to put his life together after almost five years of incarceration.

DATED this 28th day of April 2005.

Kristina Guest
Kristina Guest
Assistant Appellate Defender

SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Montana, this 28th day of April 2005.

Verna D. Stewart
Verna D. Stewart
Notary Public for the State of Montana
Residing at Helena MT
My Commission expires: November 10, 2007

(SEAL)

No. 04-1318

In The
SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN, et al.

Respondents.

On Petition For A Writ of Certiorari to the Supreme Court Of The State of Montana

---

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provision cited by Petitioner, the following is relevant:

Mont. Const., article II, section 10:

Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const., article II, section 11:

Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. . . .

Additional relevant Montana statutes are set forth in the Appendix.

STATEMENT OF THE CASE

In May of 2000, Christopher Nichols, of the Thompson Falls Police Department, initiated and was placed in charge of an investigation into suspected drug activity at 205 North Gallatin Street. After two months of surveillance, on July 11, 2000, the investigation had yielded the following facts: The residents of 205 North Gallatin were possibly involved in the manufacture of methamphetamine. The residence was large, consisting of three levels with numerous rooms. There was a great deal of traffic in and out of the residence with as many as fifteen individuals in the residence at any given time. The identities and number of actual residents were unknown. An individual matching the description of Troy Klein, a suspected occupant of the house, had purchased ammunition in Thompson Falls. Nichols had a strong suspicion that this individual might actually be Klein, but had no personal knowledge or facts to substantiate this suspicion. The two-and-a-half month investigation, which included surveillance of the home, had yielded no observation or reports of weapons sighted in the home or in the possession of any of the individuals[1]. Klein had a warrant for his arrest in connection with a nonviolent felony parole violation.

On July 11, 2000, although a search warrant had not yet been prepared or issued and the investigation was not concluded, Nichols contacted Allen Bardwell, of the Kalispell Police Department, requesting his assistance in the execution of a search warrant upon the residence. Bardwell was the team leader of the Kalispell Police Department's SWAT team. Based on the information provided by Nichols on July 11, 2002, Bardwell made the decision to accept the request for assistance. Once a

---

[1] The Petitioner incorrectly states that "Officer Nichols also learned that Klein had recently purchased ammunition at a local hardware store." Pet. 3. This statement is factually wrong. Nichols testified that an individual matching Klein's description had purchased ammunition. However, in two and a half months of investigation and surveillance, Nichols never confirmed that the individual was Klein.

SWAT team accepts a mission, there is no issue as to the type of entry that will occur. The teams are employed for the specific purpose of carrying out no-knock, forcible entries. Thus, on July 11, 2000, based on the above information, Nichols had already determined that there would be a forcible entry into the residence[2].

Bardwell immediately assumed control over the planning of the operation. As chief planning officer, it was his job to develop the attack plan for the raid. Bardwell testified that, once he agreed to provide assistance to Nichols, any information received after that point would not have impacted his decision to conduct a forcible entry into the residence. Even if informed prior to the raid that there were only two individuals in the residence, he would have conducted a forcible entry. In fact, prior to the raid, when Bardwell learned that there were only six to eight individuals in the home, although he had the assistance of more than twenty officers, neither he nor Nichols reconsidered their entry strategy.

After Bardwell agreed to assist Nichols, he contacted Flathead County Undersheriff, Chuck Curry, asking for Curry's assistance. It was Bardwell's belief that he required more manpower to conduct the raid due to the size of the home and the possibility of multiple occupants. Curry accepted Bardwell's request and subsequently participated with Bardwell in the planning and training phases of the operation. Curry received all information regarding the raid from Bardwell. Contrary to Nichols's testimony, Curry stated that he never spoke with Nichols until the Flathead County SWAT team arrived in Thompson Falls on the night of the raid. Thus, after employing the two SWAT teams' assistance, it would have been solely up to Nichols to call off the tactical teams or to modify the entry plan prior

---

[2]The Petitioner incorrectly states that Nichols and the SWAT team officers discussed whether the officers should knock and announce their presence. Pet. 4. Both SWAT team officers testified that SWAT team never knock and announce their presence and that they had never had a conversation with Nichols regarding whether the SWAT teams should knock and announce their presence.

to the raid.

Nichols, a relatively inexperienced officer, who had previously participated in only two residential searches and was acting as lead detective for the first time, testified that SWAT teams were needed because this was a methamphetamine operation. He stated that he had never heard of a knock-and-announce entry when a methamphetamine lab was involved. However, Bardwell and Curry, both seasoned officers, stated that the mere fact that this was a methamphetamine lab warrant would not justify a no-knock entry. Moreover, Bardwell testified that the potential for destruction of the alleged methamphetamine lab was not a concern in deciding to take on the assignment. Both Bardwell and Curry agreed that a methamphetamine lab cannot be destroyed in a matter of five to ten seconds.

On July 13, 2000, Nichols discovered that there was a possible surveillance camera located in the east window of the residence. This information was not available, and therefore, not relied upon by Nichols on July 11, 2002, when he employed the assistance of the tactical teams. Similarly, it was not a factor considered by Bardwell in deciding to accept the request for assistance. According to Bardwell, the alleged counter-surveillance was not a consideration in planning the raid, since the speed of entry would undermine the effectiveness of any surveillance. Bardwell also observed that the entry could be planned in such a manner as to avoid the surveillance camera. In fact, the tactical teams approached the house from the north and west, thereby effectively remaining outside of the range of the surveillance camera.

Bardwell testified that the fact of counter-surveillance was important only to the extent, that if individuals take the trouble and expense to put up counter-surveillance, it's "probably a pretty substantial operation." The state presented no evidence as to the actual size of the operation. Nichols did not express an opinion regarding the significance of the cameras relative to operation size, and did

not indicate that he had discussed this issue with Bardwell or that he was aware of this particular concern.

Nichols submitted an Application for a search warrant to the district court judge on July 24, 2000. Although Nichols knew that he intended to carry out a forcible entry, the search warrant application did not include any expression of this intention, and did not request permission to conduct such an entry.

On the night of July 25, 2000, the two SWAT teams, and other local law enforcement, converged on Thompson Falls at approximately 1:45 a.m. Combined, there were between twenty and twenty-five officers present. They were briefed and waited. While waiting to initiate the raid, Bardwell testified that he and Nichols completed a risk analysis report. Bardwell indicated that he generally used a risk analysis report to determine the necessity for use of SWAT team tactics. Such a report, normally completed at the beginning of an operation, is aimed at assessing the risk associated with specific individuals, who the officers anticipate might be present during a raid. In this instance, contrary to usual practice, the report was allegedly completed by Bardwell while he was waiting at the Thompson Falls Police Department only a few hours before the time set for conducting the raid.

The risk analysis form contains a checklist of criteria to be used in assessing risk in connection with the service of a particular warrant. The form considers whether the suspect: has a record of violence; is on probation or parole; abuses drugs and/or alcohol; is known to be mentally unstable; has a military or police background; is known to associate with organizations with known or suspected violent criminal activity; and/or is known or suspected to possess weapons.

Bardwell stated that Klein was the only person considered in conjunction with the risk analysis assessment, and the only person about whom he had any information prior to entry. He agreed that the

only criterion that applied to Klein was that he was on probation or parole for a nonviolent offense. With regard to the other factors listed in the risk analysis report, Bardwell assumed that there would be drug use by Klein since he was involved in a methamphetamine lab operation. Bardwell also assumed that there might be weapons present in the residence based on information that he had received from Nichols with regard to the purchase of ammunition. Bardwell had no objective evidence to substantiate his assumptions.

Bardwell agreed that there was no record or information of Klein ever being violent, having any violent criminal record, ever resisting arrest or assaulting a police officer, ever possessing weapons, of being mentally unstable, using drugs or alcohol, having a military or police background, or being associated with any organization suspected of violent criminal activity. Bardwell stated that he had no information regarding the identities, characteristics or background of any other individuals in the house. Bardwell felt that the raid was justified based on the information in the report, which, with regard to Klein, included his knowledge of an outstanding warrant and his assumptions regarding Klein's possession of weapons and drug use.

On the night of July 25, 2000, while the SWAT teams and other officers convened at the Thompson Falls Police Department, Nichols ordered two officers to conduct surveillance of the residence. The surveillance officers were secreted in an upstairs bedroom of the house across the street from 205 North Gallatin.

Although Nichols expressed concerns regarding the safety of neighborhood residents, he made no attempt to evacuate any residences. The state presented no facts to substantiate these concerns and no evidence that the occupants of the residence to be searched were dangerous, violent or would present a threat to officers or neighbors. In fact, the surveillance officers stationed in the house directly across

the street from the suspected residence, did not request the residents of the house to leave while the surveillance and raid were being conducted.

Officer Reinshmidt sat in surveillance for more than four hours. At 2:20 a.m., she heard somebody in the driveway yell to get inside and cut the lights. After Reinshmidt heard this statement, she contacted Nichols and reported her observations. Reinshmidt was not able to hear any conversations taking place inside the home.

Based on Reinshmidt's observations, the officers decided that their presence might have been detected. They had originally planned to execute the raid at 4:00 a.m., but because of Reinshmidt's information, chose to accelerate the time of the raid. Nichols testified that they decided to execute the raid immediately after they received Reinshmidt's call. However, the officers did not execute the raid until forty minutes later.

Between 2:20 a.m. and 3:00 a.m., Reinshmidt saw some movement in the kitchen, but no suspicious activity. The occupants of the home had turned out the lights, and the house was quiet. Reinshmidt agreed that her observations were entirely consistent with the residents preparing for or retiring for the night.

At 3:00 a.m., the officers executed their no-knock raid. As the officers approached the home it was quiet, and either all or most of the lights were off. None of the officers detected any activity or heard anything consistent with attempts to escape, resisting arrest, barricading, counterattacks, the destruction of evidence, or the dismantling of a lab, including unusual amounts of activity, toilets flushing, cleaning activity, glass breaking, etc. There was no evidence that any of the occupants had detected the officers' presence or anticipated an invasion. No evidence existed which would indicate the presence of barricades or booby traps.

The teams approached the home from the west and north, outside of the range of the surveillance camera located on the east side of the house. At least seven officers rammed the upstairs door confronting four of the occupants who were in various stages of sleep and preparation for sleep. Another seven officers entered the house through the downstairs kitchen door confronting the two occupants residing in that portion of the house. Surrounding the house were at least another five to ten officers.

As a result of the raid, the state charged the defendants with drug-related felonies, and the defendants filed motions to suppress, which argued that the officers executing the search warrant violated the defendants' federal and Montana constitutional rights by failing to knock-and-announce before the SWAT teams raided the home in the middle of the night.

On June 10, 2002, the district court conducted an evidentiary hearing. The district court explained that, although an issue of first impression in Montana, the court would analyze the question in light of the Fourth Amendment and the heightened expectation of privacy guaranteed to the citizens of Montana by the Montana Constitution. The district court then expounded that the Montana Constitution provides greater protection than that contained in the Fourth Amendment and, additionally, the Montana Constitution provides the right of individual privacy shall not be infringed without a showing of a compelling state interest. The district court concluded that under the Montana Constitution, based on the totality of the circumstances, and facts of this case, the no-knock entry was justified and the Defendants' heightened expectation of privacy was not violated. See, Pet. App. B.

The defendants appealed to the Montana Supreme Court. The Montana Supreme Court recognized that this was an issue of first impression[3] in Montana, and that it would "need to look to our

[3] Subsequently, the Montana Supreme Court has now decided another knock and announce case. *State v. Ochadleus*, ___ P.3d ___ (Mont. 2005). In *Ochadleus*, the court applied

sister states to decide this issue." However, the court emphasized that "[w]e also look to the greater protections afforded to Montanans in search and seizure matters under Article II, Section 10 and 11 of the Montana Constitution." *State v. Anyan*, 2004 MT 395, 325 Mont. 245, 104 P. 3d 511, 517. In so holding, the Montana Supreme Court cited three Montana cases analyzing the greater protection provided by the Montana Constitution. *Anyan*, 104 P. 3d at 517 (citing *State v. Bullock*, 901 P. 2d 61, 75 (Mont. 1995)("Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, broader protection than the Fourth Amendment in cases involving searches of, or seizures from, private property); *State v. Siegal*, 934 P. 2d 176 (Mont. 1997)[4]("[W]hen the people of Montana ratified a new State Constitution in 1972, the explicitly granted the citizens the right to privacy. Thus, Montana's Constitution affords citizens broader protection at the hands of the government in search and seizure cases than does the Federal Constitution"); *State v. Elison*, 14 P. 3d 456, 468-469 (Mont. 2000)(Montana's unique constitutional language affords citizens a greater right to privacy, and, therefore, provides broader protection than the Fourth Amendment in cases involving searches of private property).

The court looked to case law from other states and this Court's holding in *Wilson v. Arkansas*, 514 U.S. 927 (1995). The majority concluded that when an officer is serving a search warrant, he must knock and announce his presence unless there are exigent circumstances which would present a threat of physical violence or the likelihood that evidence would be destroyed if the rule were not followed. However, the opinion recognized that the Wilson Court left to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.

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the factors that it set forth in *Anyan* and held that exigent circumstances did exist to justify the officers' forced entry into the defendants' home.

[4]Overruled in part and on other grounds by *State v. Kuneff*, 970 P. 2d 556 (Mont. 1998)

Anyan, 104 P. 3d at 520. The court then, citing *Richards v. Wisconsin*, 520 U.S. 385 (1997), recognized that Fourth Amendment does not permit a blanket exception to the knock-and-announce requirement in felony drug cases. The court thus focused on the following factors to determine whether exigent circumstances existed in the pending case: safety concerns, futility, and destruction of evidence. Based on its determination of these factors, the Montana Supreme Court concluded that under the Fourth Amendment, the knock and announce rule applies in Montana. However, the court further expanded that "even were it not for that authority, though, Article II, Sections 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution." *Anyan*, 104 P. 3d at 524-525 (citing *Bullock*, 901 P. 2d at 75; *Siegel*, 934 P. 2d at 183; *Elison*, 14 P. 3d at 468-469). The court then held that the SWAT teams' forced no-knock entry into the defendants' house was unreasonable under the Fourth Amendment and Article II, Sections 10 and 11 of the Montana Constitution because the state failed to meet its burden to prove that exigent circumstances obviated the necessity to comply with the knock and announce rule.

The court recognized that the knock and announce rule is a flexible one, which will depend on the circumstances of each case. The court, consistent with prior Montana case law, advised that for future cases when officers contemplate a no-knock entry that intention be included on the search warrant application. *Anyan*, 104 P. 3d at 525 (citing *State ex rel. Townsend v. District Court*, 543 P. 2d 193, 195 (Mont. 1975); and *State v. Wilson*, 879 P. 2d 683, 684 (Mont. 1994)). The court concluded that the no-knock entry into the defendants' house violated the defendants' federal and state constitutional rights to be free from unreasonable searches and seizures. Thus, the court held that the trial court erred in denying the defendants' motions to suppress.

Three justices dissented and concluded that the majority: 1) had not relied enough upon *United States v. Ramirez*, 523 U.S. 65 (1998), and *United States v. Banks*, 540 U.S. 31 (2003); 2) had not given sufficient weight to the existence of a surveillance camera; and 3) had not properly considered the totality of the circumstances. The majority responded to the legal and factual arguments raised by the dissent.

REASONS FOR DENYING THE WRIT

I. ADEQUATE AND INDEPENDENT STATE GROUNDS EXIST FOR THE DECISION OF THE MONTANA SUPREME COURT.

Since this was an issue of first impression in Montana, the court recognized that it would need to look to relevant federal and state law. However, from the beginning, the majority opinion stressed that "[w]e also look to the greater protections afforded to Montanans in search and seizure matters under Article II, Sections 10 and 11 of the Montana Constitution." The majority opinion of the Montana Supreme Court concluded that, although under the Fourth Amendment the knock and announce rule applies in Montana, "[e]ven were it not for that authority, though, Article II, Section 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution."

In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), this Court held that when a state court decision appears to rest primarily upon federal law or to be interwoven with federal law and when the adequacy and independence of the state court decision is not clear from the face of the opinion, this Court will assume that the most reasonable explanation for the state court's decision is that the state court felt that federal law required it to rule in the manner it did. However, this Court also held that it will not accept jurisdiction if the state court has merely relied upon federal authorities as it would upon case authority from other jurisdictions, and the state court expressly states it is relying upon bona fide, separate and

independent state grounds. This Court, in *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), explained that its independent and adequate state ground doctrine is jurisdictional (citing *Herb v. Pitcairn*, 324 U.S. 117, 124-25 (1945)("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion."). See also, *Sochor v. Florida*, 504 U.S. 527, 533-34(1992)(This Court is without jurisdiction to review the defendant's jury instruction claim because the state court's resolution of the federal law rested on adequate and independent state grounds); *California v. Freeman*, 488 U.S. 1311 (1989)(This Court determined that state court's determination that the defendant's conduct did not constitute pandering based on adequate and independent state ground such that this Court was without jurisdiction to hear the State's petition for certiorari review).

Montana's Constitution includes Article II, Section 10, a right to privacy clause not found in the United States Constitution. Further, although the Fourth Amendment and Montana Article II, Section 11 are nearly identical, the Montana Supreme Court specifically stated that it chooses to provide greater protection in search and seizure matters under the Montana Constitution. As this Court has recognized, its power to review state-court judgments should be used sparingly. "Only in the most unusual case should the Court volunteer its opinion that a state court has imposed standards upon its own law enforcement officials that are too high." *Minnesota v. Olson*, 495 U.S. 91, 102 (1990)(Stevens, J., concurring).

In this case, the Montana Supreme Court clearly stated that it based its decision separately and independently upon Article II, Section 11 and Article II, Section 10 of the Montana Constitution. While the opinion does not contain a statement that the court is relying upon federal authority only for the

purpose of guidance, such a statement clearly is not necessary since the Montana Court looked to *Wilson* and *Richards* to explain the history and factors to consider with regard to the knock-and-announce rule, and then conducted its own detailed discussion of the facts and the factors the Montana Court considered important in this case, in conjunction with the Montana Constitution. In *Wilson*, this Court specifically left it to the state courts to determine the factors of when a no-knock entry is unreasonable. *Wilson*, 514 U.S. at 936 ("[W]e leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."). Given the greater protection provided by the Montana Constitution, the Montana Supreme Court was free to evaluate the evidence pursuant to Montana state court standards of the totality of the circumstances.

Further, the Montana Court did not rely exclusively on federal law for its guidance. Rather, besides federal law, the court looked to precedent from other states. The majority opinion cites to six decisions from five other states in support of its historical analysis and development of the factors to consider. Moreover, the majority opinion analyzed *Richards*, *Ramirez*, and *Banks*, but held that the facts present in those cases were dissimilar to those in *Anyan*, and commanded a different result. The fact that the Montana Supreme Court only used Wilson for historical background and distinguished the facts of *Richards*, *Ramirez*, and *Banks* clearly indicates that the Montana court did not feel it was required to be bound by federal law and grounded its decision upon state law.

Even when a state court announces a new legal rule, arguably derived from both federal and state law, the state court can still definitely render a decision based on adequate and independent state grounds. *Ohio v. Robinette*, 519 U.S. 33, 44 (1996)(Ginsburg, J., concurring)(citing *State v. Fuller*, 915 P. 2d 809, 816 (Mont.) cert. denied, 519 U.S. 930 (1996). Here, the Montana Court stated, besides

looking to federal law, it would look to law from other states, and the greater protections provided by the Montana Constitution to decide the issue. *Anyan*, 104 P. 3d at 517. Nowhere in the opinion does the Court state that federal precedent controlled its decision. Rather, in its conclusion, the court, just as it did in *Fuller*, specifically states, notwithstanding the Fourth Amendment, that its decision is based upon Article II, Sections 10 and 11 of the Montana Constitution. *Anyan*, 104 P. 3d at 524-25. This statement shows that the Montana Supreme Court relied upon independent and adequate state grounds.

II. THE STATE'S PETITION IS BASED ON FACTS NOT INCLUDED IN THE RECORD REVIEWED BY THE MONTANA SUPREME COURT IN REACHING ITS DECISION.

A. The Petitioner has failed to set forth an accurate statement of the case.

The Respondents contest the Petitioner's Statement of the Case as containing inaccurate facts and evidence not introduced into the record before the district court or the Montana Supreme Court. At the suppression hearing, the district court heard testimony from SWAT team leader Alan Bardwell, SWAT team leader Chuck Curry, and Thompson Falls Police Officer Shawna Reinschmidt, and received into evidence an affidavit signed by Bardwell (A copy of Bardwell's affidavit, which was introduced into the record at the suppression hearing, is attached as App. 1), and an example of the risk analysis form used by Bardwell. The district court also accepted into the record a deposition of Officer Chris Nichols taken prior to the suppression hearing.

The Petitioner's Statement of the Case before this Court is derived almost exclusively from affidavits by Nichols and Bardwell. Neither of these affidavits were received into evidence during the suppression hearing. Nichols's affidavit was prepared by the county attorney months after Nichols requested the search warrant. Although referenced by the county attorney during the Nichols's deposition, the county attorney did not introduce Nichols's affidavit into the record at the deposition or the suppression hearing. Bardwell's affidavit, which was attached to the Petitioner's Appendix, was

not the affidavit introduced into the record at the suppression hearing. Bardwell's affidavit, that the Petitioner now relies upon, was never introduced into the record during the suppression hearing nor even referenced during the suppression hearing. Further, the state of Montana never referenced this affidavit during its briefing or oral argument before the Montana Supreme Court. Moreover, the district court did not reference facts from either of these affidavits in its Findings of Fact and Conclusions of Law.

In critique of the Montana Supreme Court, and its conclusion based on the totality of the circumstances, the Petitioner requests that this Court re-evaluate the facts of this case. In support of its factual arguments, the Petitioner neglects the evidence presented during the suppression hearing, and instead relies upon evidence not introduced into the record during the hearing (Nichols's and Bardwell's affidavits), and evidence not presented or referenced on appeal to the Montana Supreme Court (Pet. App. D). This Court has previously chastised parties for failing to provide complete and full disclosure of the record. See, *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924)("[W]e have pointed out the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari."). The facts presented to this Court by the Petitioner fail to present a full disclosure of what was presented on the record before the district court, and what both parties to the Montana Supreme Court argued. Thus, this Court should disregard the facts and Statement of the Case as presented by the Petitioner.

B. It is not this Court's role to re-evaluate the evidence.

This Court has repeatedly held that granting of a writ of certiorari is not warranted merely to review the evidence or inferences drawn from it. Rule 10, Rules of the Supreme Court provides, in part, "[A] petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." See also, *Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440, 441 (1918)(Dismissing writ because the matters depended essentially upon an appreciation of the evidence); *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938) (citing *United States v. Johnston*, 268 U.S. 220, 227 (1925)); C.J.D. *Rudolph v. United States*, 370 U.S. 269, 270 (1962)(Writ of certiorari dismissed because review of facts would have been of no importance except to the litigants themselves). The Montana Supreme Court reviewed in detail the facts presented in the record and determined that exigent circumstances did not exist for the SWAT teams to raid the defendants' home without knocking and announcing. It is not the role of this Court to re-analyze the Montana Supreme Court's determination of facts and evidence.

III. THE MONTANA SUPREME COURT PROPERLY REVIEWED THE FACTS USING A TOTALITY OF THE CIRCUMSTANCES APPROACH.

The state petitions this Court for certiorari based, in part, on its claim that the Montana Supreme Court did not apply a totality of the circumstances analysis in reaching its decision. It accuses the Montana Supreme Court of reviewing each circumstance in isolation and disregarding the cumulative impact of the facts on the determination of reasonable suspicion. It asserts that the Montana Supreme Court's opinion concludes that a no-knock entry may never be established unless there exists at least one factor that, standing by itself, provides complete justification for a no-knock entry. It alleges that the Montana Supreme Court concludes that each potential exigent circumstance must be considered separately rather than collectively. A review of the Montana Supreme Court opinion shows that it contains no such conclusions or hypotheses, and that the method used by the court to analyze the facts clearly comports with a totality of circumstances approach.

The Montana Court's analysis is founded on the rule derived in *Richards* that a no-knock entry is justified if the police have reasonable suspicion that knocking and announcing their presence under

the particular circumstances existing at the time of entry would be dangerous or futile or result in the destruction of evidence. *Richards*, 520 U.S. at 394-95. The Court conducts a thorough analysis of the facts and circumstances as they relate to each of the *Richard*'s factors.

Initially, the Court examines the case in connection with the "dangerous" prong of the *Richard*'s test and finds that the following facts were established: 1) A person who may or may not have been an occupant of the house bought ammunition; 2) One of the occupants was on probation for a non-violent felony offense; 3) Two and one half months of surveillance established no evidence of actual weapons in the house, or that the persons resident therein would use violence or weapons against law enforcement; 4) A generalized claim of hazards associated with methamphetamine labs was belied by the officers' demonstrated lack of concern and failure to take any precautions with respect to the asserted hazards; and 5) There was no evidence that the residents of the house were preparing a counter-offensive or attempting to escape as the officers approached the house.

Using principles established by other state and federal courts for guidance, and keeping in mind the heightened protection afforded to its citizens under the State constitution, the Montana Court concludes that the above facts do not give rise to reasonable suspicion that the officers would have been endangered had they knocked and announced their presence.

The court next examines the issue of futility as a potential circumstance obviating the necessity to break down the door of the house. Noting the state's concession during oral argument that the futility exception does not apply, the court nevertheless observes that there was no indication that the occupants of the house were ever aware of the officers' presence. The raiders approached the house outside of the range of the surveillance camera, and there was no activity, movement or other indication that the residents were aware of the officers' approach. Based on these facts and the state's concession, the court

found that the officers were not entitled to ignore the knock and announce requirement under the futility exception.

The court then reviews the facts to determine whether the officers had reasonable suspicion to believe that evidence would be destroyed if they knocked and announced their presence. The court finds that no evidence was presented by the state that showed that the occupants of the residence were attempting to destroy evidence upon the officers approach or that would justify a no-knock entry based on the possibility of the imminent destruction of evidence after a knock and announcement. The court further noted that the two officers in charge of the operation testified that, in their experience, the mere presence of a methamphetamine laboratory would not justify a no-knock entry, and that a methamphetamine laboratory could not be destroyed in a matter of 5 to 10 seconds. Based on these facts the court determined that destruction of evidence was not a concern justifying a no-knock entry.

The court's opinion recognizes that the knock and announce rule is a flexible rule under which a court must determine whether an unannounced entry is reasonable with reference to the particular circumstances of each case. The court concludes that the knock and announce rule applies to Montana state under the Fourth Amendment, and that it will be analyzed under the principles therein, and the Montana constitution which affords heightened protection to its citizens. The court holds that "on the facts here" the forced entry into the appellant's house was unreasonable under the Fourth Amendment and Montana Constitution.

It is only in response to the dissent's complaint that the majority failed to follow a totality of circumstances approach, that the majority, quoting *People v. Condon* 592 N.E. 2d 951(Ill. 1992), cert. denied, 507 U.S. 948 (1993), explains that it must analyze each potential exigent circumstance individually "since the individual circumstances equal the totality." Indeed, how else can a court

explicate and communicate its decision in a written opinion except by discussing its reasoning with regard to each circumstance separately, prior to assessing the circumstances in their totality.

It is clear from its written opinion that the Montana Supreme Court used the correct technique, reviewing all of the facts and circumstances in the case, and reaching a decision based on consideration of the totality of those facts and circumstances. It is the state that would have the court ignore the totality approach by examining only those facts and circumstances that favor the state's position, while ignoring all other facts. Thus, the state would have the court consider the fact that someone in the house may have purchased ammunition, while ignoring the information that no weapons were ever seen in the house or in the possession of any of the occupants of the house. Further, there was no evidence that the suspects were violent or had ever previously threatened law enforcement. The state would have the court consider the fact that a surveillance camera was present, but not the fact that the camera could easily be, and was, avoided by the approaching raid team. The state would have the court consider the fact that the house may have contained a methamphetamine laboratory, but ignore the fact that a methamphetamine laboratory cannot be destroyed in seconds, and that there was absolutely no indication of any attempt to destroy evidence as the officers approached the house.

The state appears to be suggesting that analysis should proceed by way of the selection and delimitation of facts that the reviewing court can consider, to only those facts which favor the state's case, thereby effectively ignoring a totality analysis (to say nothing of reality) in favor of a structured analysis that includes facts to be determined exclusively by the state.

In its analysis of this case, the Montana Court did not create categories. (see, *Banks*) and did not exclude and delimit the facts and circumstances that it considered. See, *U.S. v. Arvizu*, 534 U.S. 266 (2002). Rather, it performed a thorough and complete analysis of all the facts and circumstances. It is

clear from its methodology and the detailed rationale set out in its opinion, that the Montana Court considered and made its decision based on a totality of the circumstances. The state's claim that the Montana Supreme Court did not apply the proper analysis in reaching its decision is wholly without merit and the petition should be denied.

IV. THE STATE'S PETITION, SEEKING TO CLARIFY THE APPROPRIATE LEVEL OF JUDICIAL SCRUTINY AND THE EXTENT OF THE FACTUAL SHOWING REQUIRED UNDER THE RICHARD'S STANDARD, IS CONTRARY TO PRINCIPLES PREVIOUSLY ESTABLISHED BY THIS COURT IN *RICHARDS*, *BANKS* AND *ARVIZU*.

The state asserts that certiorari should be granted in this case to allow this Court to provide the lower courts with additional guidance in connection with the factual showing required under the reasonable suspicion standard. The state appears to be requesting the Court to indulge in precisely the type of exercise that was disapproved in *Richards*, *Banks* and *Arvizu*.

In *Wilson*, the Court granted to the states the authority to determine the factual circumstances under which an unannounced entry is reasonable under the Fourth Amendment. Subsequently, in *Richards*, it refused to endorse a blanket exception to the knock and announce rule in felony drug investigations. *Richards,* 520 U.S. at 394-95. The Court's refusal to set generalized criteria and rules is based on the obvious fact that no two cases have identical sets of facts. In view of the singular facts of each case "... no template is likely to produce sounder results than examining the totality of circumstances in a given case." *Banks*, 540 U.S. at 35-36.

This Court has consistently refused any attempt by lower courts to create classifications and categories or to delimit the facts for purposes of facilitating the application of the reasonable suspicion standard. See: *Banks*; *Arvizu*:

> Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. *Ornelas*, supra, at 696 (principle of reasonable suspicion is not a "finely tuned standard"); *Cortez*, supra, at 417 (the cause "sufficient to authorize police to stop a

person" is an "elusive concept"). But we have deliberately avoided reducing it to "a neat set of legal rules," *Ornelas*, 517 U.S. at 695-696 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 76 L. Ed. 2d 527, 103 S. Ct.. 2317 (1983)).

Arvizu 534 U.S. at 274 (citing *Ornelas v. United States*, 517 U.S. 690 (1996), and *United States v. Cortez*, 449 U.S. 411 (1981)). "We have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Robinette*, 519 U.S. at 39; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357(1931) (no formula for determining reasonableness; each case on its own facts and circumstances).

The state's request for certiorari to attempt to wring from the Court a generalized formula to use in conjunction with the reasonable suspicion standard is contrary to precedent and completely without merit and the petition should be denied.

CONCLUSION

For the reasons above, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

DATED this the 28th day of April 2005.

Respectfully submitted,

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APPENDIX

Affidavit of Kalispell Police Sargeant Allen Bardwell

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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, v. TROY EDWARD KLEIN, Defendant.	CAUSE NO. DC-00-44 **AFFIDAVIT OF KALISPELL POLICE SARGEANT ALLEN BARDWELL**

STATE OF MONTANA)
) ss.
County of Flathead)

ALLEN BARDWELL, being first duly sworn on oath and under penalty of perjury, deposes and states:

1) I am over the age of 18, I am competent to testify and I have personal knowledge of the matters herein.

2) I am a law enforcement officer with the Kalispell Police Department in the State of Montana. My official title with the Kalispell Police Department is Sergeant.

3) I have reviewed my reports and records including the Raid Report dated July 24, 2000 with a supplement of October 5, 2000, regarding the raid and seizure of occupants at 205 North Gallatin in Thompson Falls, Sanders County, Montana occurring on July 25, 2000 at approximately 0245 hours. I personally prepared the report myself as commander of the Kalispell Police Department Team and as commander of the entire operation itself. I also prepared the Risk Analysis report regarding the risks involved in the raid & seizure, which is contained in the file.

4) The Flathead County Sheriff's Office assisted our team (Kalispell Police Department) at the request of the Thompson Falls Police Department in the raid of the house and seizure of occupants.

5) To the best of my knowledge the following individuals from the Kalispell Police Department participated in the raid & seizure on the house and occupants at 205 North Gallatin in Thompson Falls, Sanders County, Montana on July 25, 2000, including: Allen Bardwell (command & breacher), Officer Nasset (lead), Wade Rademacher (follow), Mark Mulcahy (follow), Scott Warnell (follow), James Brenden (follow). To the best of my knowledge there were other state and county law enforcement officers participating also. Furthermore, to the best of my knowledge there were federal law enforcement officers present (and I believe they were ATF).

6) The Kalispell Police Department team was responsible for conducting the raid on the upper floor of the 205 Gallatin premises.

7) I was the "command" person in the raid & seizure on the upper floor of the house & occupants therein, as well as the entire operation. It was by my verbal order on voice activated police radio that the Flathead team and our Kalispell team entered the house.

8) It was my decision not to check to see if the upper-floor closed older wooden door was locked. I did observe that the door opened inward.

9) As a part of the execution of the raid and seizure, I personally rammed the door with a steel ram. The collision broke the lock and\or door jam allowing immediate access to the house. I did not knock on the door nor announce my purpose before ramming the door, for reason of the element of surprise.

10) I ordered the simultaneous entry into the house, by both teams.

11) In executing the raid plan after I rammed the door our Kalispell team entered, whereupon we secured 4 (four) individuals. The Kalispell team and the Flathead team took the occupants by complete surprise, as it was clear the individuals were "scared to death". We\I announced we were the "Police" and for everybody to get down on the floor right away, after the entry into the structure and while moving throughout. Our team did not display the search warrant as we entered, although I did observe it before the raid. I understand that the Flathead team likewise did not display the search warrant while entering the structure. I did not view any arrest warrant, although I was informed one existed for one of the male individual occupants.

12) As part of the pre-raid preparation I was not informed of any occupants membership in any gangs, clubs or associations or other violent groups (e.g., Hells Angels, Bloods, etc.)

AAJ K.12

13) As part of the pre-raid preparation we prepared for 15 (fifteen) individuals as a potential risk of escape or flight for any individual and were informed just before the raid that there were 6-8 individuals. We had more than enough manpower to meet the situation. We were not informed if there were any priors for escape or flight on any individual inside. The risk of escape or flight of any occupant was not extra-ordinary based upon our preparations.

14) As part of the pre-raid preparation we prepared for 15 (fifteen) individuals as a potential risk of resisting arrest and we were informed just before the raid that there were 6-8 individuals. We had more than enough manpower to meet the situation. We were not informed if there were any priors for resisting arrest on any individual inside. The risk for resisting arrest was not extra-ordinary based upon our preparations.

15) As part of the pre-raid preparation we were not concerned that any occupant nor all of them would destroy an entire meth lab in the short time it took to get from the Sanders County meeting place to the house. We heard no flushing of toilets. We observed no cleaning activities consistent with someone trying to hide illegal activities. We had more than enough manpower to act quickly.

16) As part of the pre-raid preparation we were not informed of any individual possessing a weapon, displaying a weapon or of any individual having prior weapons charges. However, there was mention of the purchase of ammunition for I believe a 44 caliber gun which was of concern to the teams.

17) As part of the pre-raid preparation we were not informed of any individual having a felony, except for Mr. Klein, which I understood was a non-violent felony and his warrant for arrest was in violation of parole\probation.

18) As part of the pre-raid preparation we were not informed of any individual occupant making specific threats against law enforcement (e.g., Thompson Falls Police, Sanders County Sheriff, etc.) with the purpose of harming anyone.

19) As part of the pre-raid preparation we were not informed nor did we encounter any "booby traps" or additional fortification of the house (e.g., special steel doors, attack dogs, etc.).

20) Our camouflage colored (Woodland) tactical gear displays large raised letters that we are the Police Department. We did use helmets and goggles in the raid and seizure. We did use bullet proof vests. Our team held shotguns with live ammo while executing the search warrant. We did not use shields, hoods or flash bombs.

AAB K-12

21) Our team secured 4 (four) individuals on the top floor, 2 (two) males and 2 (two) females. I am not aware of their names, as our purpose was to secure the residence and turn it over to the Thompson Falls Police Department as soon as possible. The seized individuals were turned over to the Thompson Falls Police Department with no injuries to suspects or officers.

22) Your Affiant Sayeth Further Not.

Dated this 23 day of October, 2000

Allen Bardwell

SUBSCRIBED AND SWORN to before me this 23 day of October, 2000.

NOTARY PUBLIC in and for the State of Montana residing at Kalispell.
My Commission expires: 4-15-2002

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Supreme Court, U.S.
FILED
MAY 10 2005
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No. 04-1318

In the Supreme Court of the United States

STATE OF MONTANA,

Petitioner,

v.

TANYA MARIE ANYAN,
JAY CLEVELAND, AND TROY KLEIN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of the State of Montana

---

PETITIONER'S REPLY BRIEF

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Petitioner State of Montana respectfully submits the following brief in reply to Respondents' brief in opposition to the petition for writ of certiorari.

Petitioner seeks this Court's review of the Montana Supreme Court's interpretation and application of Richards v. Wisconsin, 520 U.S. 385 (1997). The state appellate court concluded that the officers who entered Respondents' house to serve a search warrant for a clandestine methamphetamine laboratory did not have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by allowing the destruction of evidence. The appellate court reversed the trial court's finding of reasonable suspicion and suppressed the evidence of the meth lab seized during the search.

Officer Chris Nichols of the Thompson Falls Police Department was the lead investigator and made the decision to utilize the SWAT teams that assisted with the search and made the no-knock entry at issue here. Petitioner's statement of the case therefore focuses on the facts that Officer Nichols knew or reasonably believed at the time the search warrant was executed. In their brief in opposition Respondents assert that the petition's statement is based on facts not included in the record before the Montana Supreme Court. (Brief in Opp'n at 13-15.) This assertion is patently false, and this Court should not be confused or

misled by Respondents' misrepresentation of the state court record.

Respondents' complaint concerns the affidavits of Officer Nichols and Sergeant Bardwell, discussed at page 5 of the petition and included in the petition's appendix. Respondents claim that the affidavits were not part of the record before the trial court and the state appellate court, that the information in the affidavits was not presented to the state appellate court during the appeal, and that this Court should therefore disregard the facts presented in Petitioner's statement of the case.

Contrary to Respondents' assertion, the affidavit of Sergeant Bardwell, dated November 6, 2000, was admitted into evidence during the consolidated evidentiary hearing as Exhibit C, along with an earlier affidavit that the officer had executed at the request of defense counsel. (Hr'g Tr. at 47.) In addition, Sergeant Bardwell was examined about both affidavits at the hearing. With respect to Officer Nichols' affidavit, the Montana Supreme Court expressly considered and rejected Respondents' off-record contention when it was made in a motion to strike portions of the State's brief on appeal. Respondents have inexplicably failed to advise this Court of the Montana Supreme Court's order denying their motion to strike and allowing the affidavit of Officer Nichols to remain part of the record on appeal for evidentiary purposes. The order of the Montana Supreme Court, dated September 9, 2003, is attached as an appendix to this brief.

The order is self-explanatory and needs little elaboration. In the proceedings before the Montana Supreme Court the State's brief on appeal relied in part upon Officer Nichols' affidavit and deposition testimony to set forth the facts relevant to the officers' justification for the no-knock entry. Respondents filed a motion to strike portions of the State's brief, particularly the brief's references to Officer Nichols' information about the criminal backgrounds of Troy Klein and other occupants and visitors at the house. Respondents contended that since Officer Nichols' affidavit was not separately offered and admitted as an exhibit at the consolidated evidentiary hearing on Respondents' suppression motions, the State was not entitled to refer in its brief to information in the affidavit.

The Montana Supreme Court denied the motion to strike and expressly rejected Respondents' argument that Officer Nichols' affidavit could not be considered as part of the record in the appeal. The state appellate court noted that the affidavit was filed in the trial court proceedings with the State's responses to the suppression motions, and that Officer Nichols was cross-examined about the affidavit during his deposition. Since Respondents had the opportunity to examine Officer Nichols about the affidavit and stipulated to the admission of his deposition, the substance of the affidavit was properly before the state appellate court as part of the record on appeal.

In summary, there is no legitimate dispute about the evidence that was before the trial court and the

Montana Supreme Court as the state courts considered the propriety of the no-knock entry. Petitioner's statement of the case is fully supported by the record in the state court proceedings. Information from Officer Nichols' affidavit was presented and argued to the Montana Supreme Court, and the state appellate court referred to the information in its opinion.

Petitioner is not asking this Court to consider and resolve any claims of erroneous state court factual findings. Instead, Petitioner asks this Court to review the appropriateness, under the Fourth Amendment, of the "zero plus zero" analysis that the Montana Supreme Court utilized in its consideration of the undisputed facts and circumstances relevant to the no-knock entry.

While Respondents, in opposing a grant of certiorari, may properly choose to focus their own statement of the case upon evidence that they believe is supportive of the Montana Supreme Court's decision, they should not be free to misrepresent or obfuscate the evidentiary basis for Petitioner's recitation of the relevant facts. This Court should not be dissuaded from reviewing this case by reason of Respondents' misleading assertions about the record in the state court proceedings.

For the reasons set forth in the petition, Petitioner requests that this Court grant the petition for writ of certiorari and reverse the state appellate court's judgment.

Respectfully submitted,

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May 2005

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF MONTANA
No. 02-639

STATE OF MONTANA,	)
	)
Plaintiff and Respondent,	)
v.	)
	)
TANYA MARIE ANYAN,	)
JAY CLEVELAND, and TROY KLEIN	)
	)
Defendants and Appellants.	)

On May 15, 2003, Appellants filed a Motion to Strike portions of the State's brief, pursuant to Rule 22, M.R.App.P. Specifically, Appellants ask this Court to strike the following portions of the Statement of Facts section of the State's brief: page 5, lines 2-9 and 12-19; page 6, lines 1-4 and 7-8; and page 18, lines 11-14. The sections to which Appellants object discuss an affidavit which was attached to the State's response brief in the District Court. Appellants base their objection on the fact that the affidavit was not offered and admitted as an exhibit at the consolidated evidentiary hearing on suppression motions. The affiant did not testify at the evidentiary hearing, and Appellants argue that it would be improper for affidavits to take the place of live testimony, subject to cross examination, citing *Stefonick*

v. Stefonick (1946), 118 Mont. 528, 530-531, 167 P.2d 867, 868-69. Appellants also point out that the District Court did not specifically reference the affidavit in its Findings of Fact, Conclusions of Law, and Order.

The State responds that it is proper for this Court to review the affidavit in question because it is part of the District Court record. Furthermore, the state points out that while the affiant did not testify at the evidentiary hearing, he did testify in the form of a deposition. During the deposition, the affiant was cross examined regarding the affidavit. The State relies on *State v. Flanagan*, 2003 MT 123, ¶ 16, 68 P.3d 796, ¶ 16 and Rule 9, M.R.App.P., in support of its argument. The State also points out that the District Court stated in its written order that its findings were based in part upon the District Court file and the briefs previously filed.

After considering the motion, on June 3, 2003, we took the matter under advisement and stated that we would address the matter in our forthcoming opinion. On June 26, 2003, we classified this case for oral argument which is scheduled for September 11, 2003. In light of the upcoming oral argument, we concluded that it would be helpful to the parties to rule upon the pending motion before the argument.

We deny the Appellants' Motion to Strike for the following reasons. Rule 9 of the Rules of Appellate Procedure deem the record on appeal as "the original papers and exhibits filed in the district court...." In the District Court, the State filed a Response to Defendant's

Motion and attached Officer Nichols' affidavit to the motion, thus being original papers and as such, part of the record on appeal. Even though the affidavit, as a document, is part of the original papers filed in this case, we still must consider if the substance of the affidavit may be properly considered for *evidentiary purposes*. Here the affidavit was never introduced into evidence during the evidentiary hearing or Officer Nichols' deposition. The Appellant did examine Officer Nichols about the affidavit during his deposition and the Officer answered specific questions regarding the statements made in the affidavit. Having had the opportunity to examine Officer Nichols concerning the affidavit and stipulating to his deposition, we conclude that the affidavit should remain part of the record on appeal.

IT IS HEREBY ORDERED that Appellants' Motion to Strike is denied.

The Clerk of Court shall fax copies of this Order to counsel of record.

DATED this 9th day of September 2003.

Chief Justice

/s/ Jim Regnier

/s/ James C. Nelson

/s/ W. William Leaphart

/s/ Patricia Cotter

/s/ John Warner

/s/ Jim Rice

Justices

(2)

Supreme Court, U.S.
FILED
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No. 04-1318

In the

Supreme Court of the United States

State of MONTANA,
Petitioner,

v.

Tanya Marie ANYAN, ET AL.,
Respondents.

On a Petition for Writ of Certiorari to the Supreme Court of Montana

BRIEF OF THE STATES OF ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, OHIO, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(Restated)

1. Is the Montana Supreme Court's "divide and conquer" approach to reasonable suspicion irreconcilable with the flexible totality-of-the-circumstances analysis required by this Court's decisions?

2. Is the Montana Supreme Court's hindsight-based analysis of reasonable suspicion irreconcilable with this Court's decisions requiring deference to police officers' on-the-spot judgments?

3. Does the Montana Supreme Court's decision ignore the unique dangers posed by methamphetamine labs?

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INTEREST OF AMICI CURIAE

At issue in this case is the constitutionality of a no-knock search of a suspected methamphetamine lab. Amici, all of whom are grappling with the onset of the methamphetamine scourge, support the State of Montana's petition for certiorari to remedy the Montana Supreme Court's disregard for this Court's settled Fourth Amendment precedent.[1] In assessing whether police officers had reasonable suspicion to justify a no-knock entry, the state court turned a blind eye to this Court's longstanding totality-of-the-circumstances analysis in favor of the very "divide-and-conquer" approach recently condemned in *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Arvizu*, 534 U.S. 266 (2002). This Court should grant the petition and set the case for argument or, quite possibly, summarily reverse.

STATEMENT OF THE CASE

Given the nature of the question presented – whether the court below impermissibly ignored the "totality of the circumstances" in assessing the validity of the police officers' no-knock entry – a complete factual picture is necessary.

In late May 2000, Officer Christopher Nichols of the Thompson Falls, Montana, Police Department began investigating suspected illegal drug activity in a local

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[1] As in *Michigan v. Long*, 463 U.S. 1032, 1038-44 (1983), the Montana Supreme Court's conclusory statement that the no-knock entry violated the Montana Constitution does not create an "adequate and independent" state ground that would preclude review of its Fourth Amendment analysis. This issue is addressed at some length in the Petition. *See* Pet. at 22-24.

rental house. Officer Nichols determined that its occupants were operating a clandestine methamphetamine laboratory. Based on information indicating a large number of occupants in the house, on July 11, 2000, Officer Nichols requested assistance from the SWAT team in neighboring Kalispell, Montana. When team leader Sergeant Allen Bardwell learned that the three-story house was occupied by as many as 15 individuals, he contacted the Flathead County Sheriff's Department SWAT team, led by Undersheriff Chuck Curry, for additional assistance.

Officer Nichols shared with Sergeant Bardwell and Undersheriff Curry the information he had accumulated: Of several vehicles displaying Washington state license plates that were regularly observed at the rental house, one was registered to Respondent Troy Klein - one of several persons renting and occupying the house. Although Klein passed himself off as "Shawn Peterson" to local officers and citizens, Officer Nichols had identified Klein and learned that he had been charged previously with drug offenses in Spokane County, Washington. On speaking to Washington authorities, Officer Nichols had learned that Klein had three outstanding arrest warrants in Washington State, that he was in violation of his probation, and that he had been charged previously with unlawful possession of a firearm. Officer Nichols had also discovered that Nichols had recently purchased ammunition at a local hardware store, which led him to believe that Klein and/or the other occupants of the house possessed weapons.

Officer Nichols had also learned that at least six other occupants of - or frequent visitors to - the rental house had criminal backgrounds involving violence, including felony assault, domestic assault, intimidation with a weapon, carrying a concealed weapon, and unlawful

imprisonment. During one visit to the house, Officer Nichols had observed a surveillance camera monitoring the outside of the house; nighttime patrols confirmed that the house stayed illuminated throughout the evening. These circumstances created concern that the occupants would receive advance notice of any police approach and arm themselves, barricade the doors, or destroy evidence before a search warrant could be executed.

Sergeant Bardwell, in particular, thought that the use of a surveillance system indicated a "substantial [methamphetamine] operation." Based on the volatile nature of the elements used to make methamphetamine (of which more below, *see infra*, at 17-20), Officer Nichols was concerned about the possibility of an explosion if the occupants attempted hurriedly to dismantle the meth lab.

Nichols, Bardwell, and Curry discussed their concerns and the potential hazards facing the officers involved in executing a search warrant. Given the risks, the three agreed that a no-knock entry would best ensure the officers' safety. The plan involved a swift, well-manned entry by the SWAT teams to ensure that the occupants could not destroy the laboratory or other evidence (purposefully or otherwise) and to thwart any violent response to the officers' presence.

Officer Nichols obtained a warrant[2] from the trial court to search the rental house for evidence of the meth

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[2] The Montana Supreme Court took issue with the officers' failure to obtain advance approval for a no-knock entry; however, no-knock warrants are not statutorily authorized in Montana. Regardless, the absence of advance permission does not affect the officers' "authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant [was] being executed." *Richards v. Wisconsin*, 520 U.S. 385, 396 n.7 (1997).

lab, and the officers agreed to execute the warrant at 4:00 a.m. the next morning. The officers then placed the rental house under surveillance and monitored activity from an upstairs bedroom window located in a house across the street. Officers involved in the search arrived at the Thompson Falls Police Department around midnight for a briefing. Roughly two hours later, at 2:20 a.m., Officer Shawna Reinschmidt reported to Officer Nichols that Klein's vehicle had left the house five minutes earlier and that when the driver returned, he had climbed out of the car and ordered everyone to go inside the house and to turn off the lights. Immediately thereafter, Officer Reinschmidt observed movement inside the kitchen and around the house. Officer Nichols - interpreting the information to mean that the occupants had learned about the out-of-town SWAT teams and were destroying evidence and/or preparing for the search - advanced the search to 3:00 a.m.

The Kalispell SWAT team reached the top floor of the house on an outside stairwell and used a steel ram to break the doorjamb. Simultaneously, the Flathead SWAT team - which, on approach, had observed a second surveillance camera mounted on a tripod near the carport and entry door - entered the ground floor through an open doorway. The six occupants of the house, including Respondents Anyan, Cleveland, and Klein, were arrested, removed from the house, and decontaminated. Officers from the Criminal Investigation Division of the Montana Department of Justice then entered the house to collect evidence, disassemble the meth lab, and decontaminate the area.

Respondents moved to suppress the fruits of the search on the ground that the officers' no-knock entry violated the Fourth Amendment. Based on testimony from Bardwell, Curry, and Reinschmidt, as well as a

deposition given by Officer Nichols, exhibits, and the court file, the trial court denied the motions. During the evidentiary hearing, all of the parties cited to and relied on *Richards v. Wisconsin*, 520 U.S. 385 (1997). In its written order, the court – applying the "reasonable suspicion" standard set out in *Richards* – concluded that the totality of the circumstances known to the officers at the time they executed the warrant, justified their actions. The court emphasized the officers' belief that knocking and announcing their presence would be either dangerous or futile, or that it would inhibit the effective investigation of the crime by permitting the destruction of evidence. It found that the facts and circumstances known to the officers – including (i) the presence of surveillance cameras, (ii) the presence of firearms in the house, (iii) the potential for violence during execution of the warrant, (iv) the size of the house and number of occupants, (v) the presence of a fugitive felon, and (vi) the presence of a volatile and hazardous meth lab – warranted a no-knock entry.

In a 4-3 decision, the Supreme Court of Montana reversed. Rather than considering the totality of the circumstances known to the officers, the majority sorted the various circumstances into three distinct categories and found that, *standing alone*, none provided reasonable suspicion to support a no-knock entry. *State v. Anyan*, 104 P.3d 511, 516-20, 521-24 (Mont. 2004). Referring to the first set of circumstances as "safety concerns," the majority dismissed evidence indicating that occupants with serious criminal backgrounds were in possession of firearms and ammunition as "generalized fears." *Id.* at 521-23. It also casually discounted the danger created by the meth lab, pointing to the officers' failure to evacuate nearby homes and the absence of detectable resistance to law enforcement or information indicating the

destruction of evidence. *Id.* at 523. Under the second heading, "futility," the majority portrayed facts related to the occupants' counter-surveillance as essentially immaterial to the planning and execution of the search and ruled that the security equipment did not justify a no-knock entry. *Id.* at 523-24. In its final category, "destruction of evidence," the majority treated the potential disassembly and destruction of the meth lab as irrelevant to the officers' decision to make a no-knock entry. *Id.* at 524. Because, the court said, a large quantity of drugs would be nearly impossible to destroy in the short amount of time between the initial knock and entry, a no-knock entry was not warranted. *Id.*

Based on its rejection of each of the pigeonholed circumstances, and criticism of the officers' failure to craft an announced entry to counter the known exigencies, the majority concluded that the no-knock entry violated the Fourth Amendment. *Id.* at 520, 525. In its conclusion, the majority specifically rejected the contention that *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Ramirez*, 523 U.S. 65 (1998), required it to evaluate the circumstances bearing on reasonable suspicion holistically and "synergistically." *Id.* at 525-26.

The three dissenting justices, viewing the evidence under the reasonableness standard set out in *Richards*, found that the circumstances, as characterized by the officers at the evidentiary hearing, and taken as a whole, warranted a no-knock entry. Relying on the reasonable suspicion standard as applied in *Richards*, *Banks*, and *United States v. Arvizu*, 534 U.S. 266 (2002), the dissent contended (quoting *Arvizu* itself) that the majority's "divide-and-conquer analysis" was contrary to the "totality of circumstances" test delineated by this Court. 104 P.3d at 528-32.

SUMMARY OF ARGUMENT

When evaluating alleged Fourth Amendment violations, this Court has consistently assessed law enforcement officers' actions in light of *all* of the facts and circumstances known to them at that time. The Montana Supreme Court rejected that holistic review in favor of the very type of factor-by-factor approach this Court condemned in *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Arvizu*, 534 U.S. 266 (2002). Using its dissociative analysis, the state court here invalidated a no-knock entry of a three-story rental house that was used as a clandestine meth lab and that was occupied by people with serious criminal backgrounds who were both armed and likely alerted to the officers' presence. The state court's decision is flatly contrary to this Court's Fourth Amendment precedent – including *Banks*, *Arvizu*, and *Richards v. Wisconsin*, 520 U.S. 385 (1997) – stating that reasonable suspicion is to be determined through a flexible, holistic, realistic review of all of the circumstances known to the officers carrying out a law enforcement function. Given the starkness of the conflict, this Court should consider summary reversal.

REASONS FOR GRANTING THE PETITION

I. The Montana Supreme Court's "Divide and Conquer" Analysis Is Irreconcilable With the Flexible Totality-of-the-Circumstances Analysis Required by This Court's Decisions.

With all respect to the Montana Supreme Court, its decision here warrants summary reversal. In the teeth of this Court's decisions in *United States v. Banks*, 540 U.S. 31 (2003), and *United States v. Arvizu*, 534 U.S. 266 (2002) – both of which require a holistic, totality-of-the-

circumstances approach to reasonable suspicion – a majority of the Montana court considered each of several exigent circumstances in isolation to conclude that inadequate evidence existed to support the officers' no-knock entry. Indeed, the majority specifically rejected the dissent's appeal to apply this Court's "totality of the circumstances" test and, in its place, opted for a formalistic factor-by-factor approach. Because, as we will show, the Montana court's analysis cannot be squared with *Banks*, *Arvizu*, or other Fourth Amendment precedent, this Court should summarily reverse (or, at least, grant the petition to set matters straight regarding *Arvizu* and *Banks*).

1. The practice of treating "reasonableness as a function of the facts of cases," *Banks*, 540 U.S. at 35-36, naturally lends itself to a totality-of-the-circumstances review. Accordingly, this Court decisively rejected the Ninth Circuit's rulings in *Arvizu* and *Banks*, in which that court had judged reasonable suspicion by compartmentalizing and categorizing facts rather than by examining them holistically. Because the Montana court here seems to have taken a page out of the Ninth Circuit's *Arvizu/Banks* playbook, a careful examination of those cases is necessary.

Arvizu involved an officer's stop of an automobile later discovered to contain nearly 130 pounds of marijuana. The question there – much as here – was whether the officer had reasonable suspicion to make the stop consistent with the Fourth Amendment. *Arvizu*, 534 U.S. at 266. The district court said yes, but the Ninth Circuit reversed. *Id.* The Ninth Circuit found that a "fact-specific weighing of circumstances" created "'a troubling degree of uncertainty and unpredictability'" in Fourth Amendment analysis and instead opted to "delimit" those factors that should be "considered by law

enforcement officers in making stops." *Id.* After compiling a list of 10 factors, the court weighed each in turn and held that seven of them "carried little or no weight in the reasonable-suspicion calculus." *Id.* The court then determined that the remaining factors were inadequate to justify the stop. *Id.*

On certiorari, this Court reversed. Reiterating the totality-of-the-circumstances test that governs reasonable suspicion inquiries and the deference due to law enforcement officers' in-the-field judgments, this Court found that "the approach taken by the Court of Appeals ... depart[ed] sharply from the teachings of [its totality-of-the-circumstances] cases." *Id.* at 273-74. Such an "evaluation and rejection" of factors "in isolation from each other," this Court emphasized, conflicted with precedent that "preclude[d] this sort of divide-and-conquer analysis." *Id.* at 274-75. Law enforcement officers, this Court continued, are permitted to rely on their knowledge and experience in assessing the facts to find that the circumstances warrant further inspection. *Id.* at 275-76. After criticizing the Ninth Circuit for "casually rejecting" facts that when considered cumulatively led to a logical inference of illegal activity, this Court found that, upon giving the "totality of the circumstances ... due weight[,]" the officer possessed reasonable suspicion to conduct the traffic stop. *Id.* at 276-77.

Notwithstanding the unequivocal rejection of its formalistic analysis in *Arvizu*, the Ninth Circuit made essentially the same fundamental error in *Banks*. At issue there was whether officers' 15-20 second delay between knocking and entering a suspected drug dealer's apartment violated the Fourth Amendment. The district court (again) denied the motion to suppress, but the Ninth Circuit (again) reversed. *Banks*, 540 U.S. at 33-34. This time, the court of appeals created four categories of

entries under which to judge the reasonableness of a delay. *Id.* Ultimately, the court concluded that no exigent circumstances existed to justify destroying property to gain entry into Banks's apartment. *Id.* at 34-35.

This Court (again) rejected the Ninth Circuit's formalistic approach. Reasonableness, this Court reiterated, is "a function of the facts of cases" and thus necessarily requires a court to consider the totality of the circumstances. *Id.* at 35-36. A contrary approach – pigeonholing facts into distinct categories – would inevitably "giv[e] short shrift to details that turn out to be important in a given instances, and ... inflat[e] marginal ones." *Id.* at 36. After concluding that the officers possessed reasonable suspicion to justify their swift entrance, *id.* at 37-40, this Court condemned the Ninth Circuit's "four-part scheme for vetting knock-and-announce entries" on two grounds. *Id.* at 41. First, the Court noted that it had rejected a similar "attempt to subdivide felony cases" based on the level of exigency in *United States v. Ramirez*, 523 U.S. 65 (1998). *Banks*, 540 U.S. at 41-42. Second, the Court said, the Ninth Circuit had simply failed to come to grips with the earlier reversal in *Arvizu*. In *Banks*, "as in *Arvizu*, the Court of Appeals's overlay of a categorical scheme on the general reasonableness analysis threaten[ed] to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes." *Id.* at 42 (citing *Arvizu*, 534 U.S. at 274).

Arvizu and *Banks* do not stand alone. By contrast, this Court's cases have consistently and unmistakably rejected the notion that exigent circumstances are to be reviewed in isolation in determining Fourth Amendment reasonableness. Time and again, this Court has held that reasonableness is determined through considering the total circumstances known to the officers carrying out a

law enforcement function. *See Ramirez*, 523 U.S. at 71-72 (applying the reasonableness standard to a no-knock entry that resulted in the destruction of property); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (allowing a search of spaces adjacent to the location of an in-home arrest when the police reasonably suspect a risk of danger); *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (approving search of a vehicle for weapons based on "specific and articulable facts" and the "rational inferences" drawn therefrom); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (reviewing all the facts considered by an officer in surmising that an individual is armed and dangerous to justify a limited protective patdown). Particularly relevant here - a case involving no-knock entries - this Court has held that "law enforcement interests may ... establish the reasonableness of an unannounced entry." *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). And, indeed, reaching the issue at debate here, this Court has specifically approved a no-knock entry when the cumulative facts established that law enforcement possessed a reasonable belief that the defendant would destroy drug evidence. *Richards v. Wisconsin*, 520 U.S. 385, 395-96 (1997).

Seemingly ignoring all of these decisions - *Arvizu* and *Banks* most prominently - the Montana court parsed, discounted, and eliminated factors that, in its view, did not *alone* justify a no-knock entry (even if, taken together, they may well have supported the entry). First, the majority discarded information indicating that the occupants possessed firearms and had criminal backgrounds, writing it off as nothing more than "generalized fears." *State v. Anyan*, 104 P.3d 511, 522-23 (Mont. 2004). Second, it rejected the officers' concerns about the "inherent dangers in methamphetamine labs" and found that the threat could be avoided by evacuating

nearby residences. Based on its position, the court concluded – contrary to the clear record evidence – that the lab was not a significant factor in devising how to execute the warrant. *Id.* at 523, 524. Third, the court discounted the officers' concerns about safe entry into the residence by pointing to evidence that the occupants had hurriedly retreated into an intentionally darkened rental house which thereafter remained ominously quiet. *Id.* Fourth, it downplayed the use of surveillance equipment on the basis that law enforcement had planned for that contingency in its approach route. *Id.* at 524. Finally, the majority dismissed concerns over evidence destruction based on its generalization that it was practically impossible to destroy and dispose of materials generated by substantial drug operations. *Id.*

By engaging in the prohibited "divide-and-conquer analysis," *Arvizu*, 534 U.S. at 274, the Montana court here – like the Ninth Circuit before it – "seriously undercut the 'totality of the circumstances' principle which governs the existence *vel non* of 'reasonable suspicion.'" *Id.* at 275.

2. The Montana court's *analysis*, therefore, cannot be squared with the holistic totality-of-the-circumstances approach to reasonable suspicion embraced by this Court in *Arvizu*, *Banks*, and their predecessors. Once a proper analysis is undertaken, the *result* here becomes equally unjustifiable. Indeed, a forthright discussion of the cumulative facts known to the officers leads unmistakably to the conclusion that the officers had ample reasonable suspicion to justify a no-knock entry.

Consider the full picture: Law enforcement officers faced the quandary of how safely to enter a three-story rental house being used as a meth lab. The house was occupied by as many as fifteen individuals, at least six of whom had violent criminal backgrounds. Respondent Troy Klein, a renter and occupant of the house, had been

convicted of drug offenses, had three outstanding warrants in Washington State, and was in violation of his probation. Additionally, Klein had previously been charged with unlawful possession of a firearm and had purchased ammunition from a local hardware store. Six other known occupants of the rental house also had criminal backgrounds, including convictions for felony assault, domestic assault, intimidation with a weapon, carrying a concealed weapon, and unlawful imprisonment. These facts – together – led authorities to believe that Klein, and possibly other occupants, could be armed at the time a search warrant was executed.

In addition, the police knew that the occupants had installed a surveillance camera to monitor the outside of the house. Its presence created two concerns. First, because the house remained lit at all hours, the camera would alert occupants to the police presence and thereby allow them to barricade entry points, arm themselves, and destroy evidence. Second, the camera led authorities to believe that the meth lab constituted a "substantial operation" and, therefore, involved large quantities of meth ingredients. The volatile nature of those ingredients, *see infra* at 17-20, risked an explosion and resulting contamination if the laboratory were hurriedly disassembled.

Finally, after obtaining a warrant, but approximately two hours before its planned execution, an individual driving Klein's vehicle left the house and then, less than five minutes later, returned and loudly ordered its occupants to go inside and to turn off the lights. His action indicated that the occupants were alerted to the impending search and provided additional concerns that the occupants would either attempt to disassemble the lab quickly or undertake measures to impede, if not altogether thwart, entry into the rental house – or both.

Given the facts known to the officers here, this case follows *a fortiori* from *Richards*, in which this Court sustained a no-knock entry. There, the suspect was given mere minutes to assess and react to the presence of law enforcement. 520 U.S. at 395-96. Here, the occupants had anticipated and apparently readied themselves for a search. Thus, the officers faced the likelihood that they would be detected on approach to the house and that the occupants would seek to prevent efforts to enter. These facts created a real concern for officer safety (both that the officers could face a gun battle and that an explosion could result from a hurried dismantling of the laboratory), as well as reason to believe that evidence (both the precursor materials and the laboratory itself) could be destroyed. Under such circumstances, the officers possessed more than ample suspicion to justify a no-knock entry. *See Richards*, 520 U.S. at 388-89 (affirming a no-knock entry when the defendant had identified a police presence and would willingly destroy the drug evidence); *see also Banks*, 540 U.S. at 33, 38-40 (approving a short delay between announcement and entry when the defendant could quickly flush away drug evidence); *Ker v. State of California*, 374 U.S. 23, 25-29, 40 (1963) (finding "that justification for the officers' failure to give notice [was] uniquely present" when facts indicated the defendant possessed readily disposable narcotics and had already exhibited furtive conduct).

II. The Montana Supreme Court's Hindsight-Based Analysis Is Irreconcilable With This Court's Decisions Requiring Deference to Police Officers' On-the-Spot Judgments.

Binding (and nearly on-point) case law aside, the Montana court's decision here cannot be squared with real life. Police officers are human beings and, like other

human beings, assimilate *all* information available to them in making judgments. They cannot and do not compartmentalize and disaggregate information into discrete categories - *e.g.*, safety, futility, destruction of evidence. By engaging in that sort of stilted analysis - and, in essence, by faulting the officers for not engaging in that sort of stilted analysis, the Montana court ignored the way the human brain works. And because judgments about probable cause, reasonable suspicion, and the like are necessarily and appropriately tied to factual judgments made by *real* police officers doing *real* police work in the *real* world, the Montana court's analysis also ignores the way the Fourth Amendment works. This Court has repeatedly and correctly emphasized the importance of giving the benefit of the doubt to officers when they make on-the-spot judgments in the hurly-burly of day-to-day police work. Just a few examples:

- *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (according "due weight" to how a "police officer views ... facts through the lens of his police experience and expertise");
- *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.");
- *United States v. Ortiz*, 422 U.S. 891, 897 (1975) ("[O]fficers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers.");
- *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("In all situations the officer is entitled to

assess the facts in light of his experience in detecting illegal entry and smuggling."); and

- *Terry v. Ohio*, 392 U.S. 1, 27 (1968) ("[D]ue weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

Reviewing facts in isolation and out of context impermissibly ignores the practical realities faced by officers when making split-second judgments in the field. *See Ramirez*, 523 U.S. at 71 n.2 ("determining the lawfulness of entry" based on "what the officers had reason to believe *at the time of their entry*") (citing *Ker*, 374 U.S. at 40-41). The Montana court's dissociative analysis would impose unreasonable constraints on officers' ability to act on - and react to - their perceptions and intuitions as well as cold, hard facts acquired during the course of an investigation. It is, as this Court has said, for the very reason that reasonable suspicion deals "not with hard certainties, but with probabilities," *Cortez*, 449 U.S. at 418, that deference to officers' specialized knowledge and experience is appropriate. The Montana court's refusal to take the officers' perspectives into account cannot be justified - either under this Court's case law or under common sense.

III. The Montana Supreme Court's Decision Ignores the Unique Dangers Posed by Methamphetamine Labs.

Methamphetamine production is an exploding facet of the illicit drug industry. *See* National Drug Intelligence Center, *California Northern and Eastern Districts Drug Threat Assessment* (Jan. 2001), *at* http://www.usdoj.gov/ndic/pubs/653/meth.htm (discussing the precipitous rise in methamphetamine use and production); The National Methamphetamine Drug Conference, *Workgroup* 4

Clandestine Labs: Protecting the Environment and Community, at http://www.ncjrs.org/ondcppubs/publications/drugfact/methconf/appen-b4.html (growth in meth labs). In addition to the usual concerns that officers face when executing a search (*e.g.*, the presence of weapons), officers facing the meth scourge must take into consideration new threats created by the volatile precursor chemicals used in the production of meth and the side effects often suffered by participants in the production process.

To begin with, the chemicals used for the production of meth are extremely volatile and combustible and, accordingly, create dangers of fire, poisoning, and intentional or unintentional explosion. *See* P. Warner et al., *The Methamphetamine Burn Patient*, Journal of Burn Care & Rehabilitation, Sept./Oct. 2003, at 275 (noting that the combustible nature of several production ingredients "lead[] to an increased incidence of methamphetamine laboratory explosions"); The National Methamphetamine Drug Conference, *supra* (in 1995, approximately one in six meth labs resulted in an explosion and detailing the dangers of fire and explosion caused by the production process); Statement of Armand McClintock Before the House Committee on Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources, Fighting Methamphetamine in the Heartland: How Can the Federal Govern State and Local Efforts? (Feb. 6, 2004), *at* http://www.usdoj.gov/dea/pubs/cngrtest/ct020604.htm (the El Paso area alone suffered 19 meth-induced fires and explosions in 2001, 35 in 2002, and 21 in 2003).

To make matters worse, many meth labs are "mom and pop" shops. They "are not laboratories in the purest sense; they are 'bucket' chemistry, literally." The National Methamphetamine Drug Conference, *supra*. In those "labs," novices are combining what may appear at a

glance to be innocuous ingredients when, in fact, many of the chemicals involved in making meth are quite dangerous in their own right. *See* Statement of Armand McClintock, *supra* ("cooks" at small labs "are generally less experienced and have little regard for the consequences arising from the use of . . . chemicals"); Paul Morris, Case Notes, *Fouse v. State: The Arkansas Nighttime Search Rules – Helping Make Arkansas the Country's Number One Producer of Methamphetamine*, 53 Ark L. Rev. 965, 978 (2000) ("Smaller labs are usually more dangerous than larger operations because the cooks are generally less experienced chemists who often have little regard for the safety issues that arise when dealing with explosive and poisonous chemicals.").

The point for present purposes is that a knock on the door followed by a "Police!" announcement will alarm those inside. That may at times be a good thing, but not here. Alerted to the officers' inevitable entry and seizure of incriminating evidence, culpable parties will hastily attempt to dispose of ingredients or dismantle the lab. One wrong combination of chemicals could result in a fire or an explosion (as apparently happens fairly frequently, if El Paso's experience is at all indicative, *see supra*). And, indeed, those more well-schooled in the chemistry of meth could intentionally harm entering officers. An experienced "cook," deviously aware of the chemical cocktail available to him, could turn the laboratory into a virtual time bomb. *See* Morris, *supra* at 978 (suggesting a "booby trap" scenario available to an experienced meth producer). All of this is simply to say that where, as here, notice will only make matters worse, officers should be given discretion to assess the situation and decide whether surprise is the best option. The Montana court's formalistic decision has the effect of denying them that flexibility.

There is another problem. Meth users (and, to some degree even producers who might not actually use) pose a unique threat to law enforcement. Methamphetamine is a "powerful stimulant that affects the central nervous system" and produces irrational and sometimes violent behavior. *See* National Drug Intelligence Center, *supra* (explaining the sundry side effects of methamphetamine); *see also* The National Methamphetamine Drug Conference, *supra* (chemicals used in the production process create "potent compounds" comprised of "metal and sulfite agents and solvents ... that can enter the [central nervous system] and cause neural damage"). Meth can induce paranoia, hallucinations, and delusions, *see* National Drug Intelligence Center, *supra*, all of which can contribute to aggressive resistance to a search or ensuing arrest. In one case, a man believed to be taking methamphetamine and "acting paranoid" shot and killed a police officer when he attempted an arrest. *See id.* (citing April 14, 2000, *San Francisco Chronicle*). The point, again, is simply that users and even non-user producers of meth are particularly prone to irrational, violent behavior. In some cases, advance notice by police of a search, however slight, would only heighten the lab operators' paranoia and anxiety. If these meth labs are to be taken down effectively and with minimal risk (to all involved) surprise may sometimes be necessary.

Given these unique concerns, numerous courts have approved no-knock entries of meth labs both supported by, *see United States v. Streeter*, 907 F.2d 781, 789 (8th Cir. 1990), and in the absence of, *see People v. Messina*, 212 Cal. Rptr. 75, 80 (Cal. Ct. App. 1985), search warrants. In one case, the Oregon Court of Appeals went so far as to hold that "a working methamphetamine lab" is itself "an exigent circumstance." *State v. Chapman*, 813 P.2d 557, 561 (1991). In the light of the array of dangers posed by meth

labs, officers should be given leeway in determining how best to approach and search them. *See United States v. Musa*, No. 03-3343, 2005 WL 639707, at *3-6 (10th Cir. Mar. 21, 2005) (approving a no-knock entry where police were aware that defendant was dealing methamphetamine and his prior arrests indicated a violent temperament); *United States v. Hernandez*, 252 F. Supp. 2d 1190, 1191-93 (D. Kan. 2003) (upholding a no-knock entry where the defendant had a criminal history involving illegal possession of firearms and was suspected of producing methamphetamine). Again, without justification either in law or in logic, the Montana court denies officers that discretion.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and summarily reverse, or, alternatively, set the case for a hearing on the merits.

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